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MASSACHUSETTS LAW QUARTERLY

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The Twenty-Sixth Report of the

Judicial Council of Massachusetts

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The Petition Filed by the Members of the Executive Committee of the Massachusetts Bar Association in Regard to the Legality of the Initiative Petition Relating to Old Age Assistance Voted on at the State Election in November 1950.

Introductory Statement

This petition as filed, challenging the legality of the Initiative measure to impose, as estimated, millions of expense on the commonwealth, has naturally attracted attention in the press. In order that members of the association may understand what the members of the Executive Committee are doing and why, and to answer questions which have been asked as to the grounds of the petition, we print the petition (without the exhibits). This is not the time or place to argue the questions raised.

In the November "Quarterly" we quoted Edmund Burke as saying in his address to the electors of Bristol in 1774

> "government and legislation are matters of reason and judgment and not of inclination."

The petitioners believe that these questions involve the future safety and solvency of Massachusetts and are of such far-reaching concern to all the people and their "posterity", that, under our "government of laws", it is part of their public function, as lawyers, to bring the questions before the court for decision in a representative proceeding to enforce what they believe to be the public duty of two state officers.

Since this was printed, we have received the respondents' demurrer and answer and, in order to present the issues fairly, we print a summary of them on pages 15-16. The demurrer was argued before the single justice. Briefs were filed. A statement of facts was agreed upon and the case was reserved without decision "for the determination of the full court" on the pleadings and agreed facts, "on all questions of law and discretion if any involved".

F.W.G.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPREME JUDICIAL COURT

Samuel P. Sears
Reuben Hall
Paris Fletcher
Frank W. Grinnell
William B. Sleigh, Jr.
Thomas M. A. Higgins
Frederick M. Myers
Fredric S. O'Brien
Ines DiPersio
Bennett Sanderson
Fletcher Clark, Jr.,

Petitioners

vs.

John E. Hurley, of Boston,
Treasurer and Receiver
General of the Commonwealth
and
Patrick A. Tompkins, of Boston,
Commissioner of Public Welfare,

Respondents

Petition for Mandamus

To the Honorable the Justices of the Supreme Judicial Court:

Now come Samuel P. Sears of Newton, President; Reuben Hall of Newton, a Vice-President; Paris Fletcher of Worcester, Treasurer; Frank W. Grinnell of Boston, Secretary; William B. Sleigh, Jr. of Marblehead, Assistant Secretary; Frederick M. Myers of Pittsfield; Thomas M. A. Higgins of Lowell; Ines DiPersio of Belmont; Bennett Sanderson of Littleton; Frederick S. O'Brien of Lawrence; and Fletcher Clark, Jr. of Middleboro, all members of the Executive Committee of the Massachusetts Bar Association, petitioning as citizens of Massachusetts interested in the execution of laws, for themselves and on the behalf of all other citizens of Massachusetts and their "posterity" similarly interested, respectfully represent that:

1. The petitioners are citizens, voters and taxpayers of Massachusetts interested in the execution of the laws and file this petition on behalf of themselves and all other citizens of

Massachusetts and their posterity, for whose protection the Constitution was expressly ordained and established, similarly interested under the Constitution of Massachusetts.

2. The respondent, John E. Hurley of Boston in the County of Suffolk, is the Treasurer and Receiver General of the Commonwealth of Massachusetts, and the respondent, Patrick A. Tompkins of Boston, is the Commissioner of Public Welfare, having charge under Section 2 of Chapter 121 of the General Laws of the administration and enforcement of all laws which it is the duty of the Department of Public Welfare to administer and enforce and specifically of Chapter 118A of the General Laws relative to assistance to the aged or the substitute Chapter 118A hereinafter mentioned if legally valid.

The petitioners are informed and believe, and, therefore aver that:

3. "Our fathers left us a government and a constitution . . . The fundamental principle of that Constitution and Government was representative government, as applied to a republic."

4. That Constitution framed by the first American Constitutional Convention, was ratified for the purpose, as stated in its "Preamble", "of forming a New Constitution of Civil Government, for Ourselves and Posterity".

5. It "is the undoubted fact that the power to pass general and statewide legislation under the Constitution was vested in the General Court" in 1780, and that power embodying the "representative principle", still remains there as an exclusive power, except so far, and only so far, as expressly modified by the 48th Amendment adopted in 1918 on recommendation of the Constitutional Convention of 1917.

6. That fundamental representative principle was in 1780, and still is, expressly embodied in the Bill of Rights, Articles X, XVII, XVIII, XIX, XX, XXIII, XXV, XXVII, XXVIII, and XXX, as well as throughout the "Frame of Government" which follows and is based on the Bill of Rights.

7. By the 48th Amendment of 1918 the voting people, acting on recommendation of that Constitutional Convention above mentioned, separated from the general exclusive "representative" power of the General Court, composed of elected

representatives of all the people, a special limited and guarded power and granted this power to a specified number of "qualified voters." The limited power, thus granted, is, by the collection of signatures of other "qualified voters."

1. To initiate constitutional amendments.
2. To initiate laws.
3. To secure a suspension of a law and referendum.
4. To secure a referendum on a law without suspension.

8. The power thus granted did not include the power to "initiate" anything but constitutional amendments or "laws."

9. The "initiative" machinery was strictly limited in the amendment by a clause specifying a variety of "excluded matters" and, particularly, this clause provides that "no measure . . . that makes a specific appropriation of money from the Treasury of the Commonwealth, shall be proposed by an initiative petition."

10. The amendment also provides that "the limitations on the legislative power of the General Court in the Constitution shall extend to the legislative power of the people as exercised hereunder."

11. The 62nd and 63rd Amendments to the Constitution framed by the same Convention of 1917-19 and submitted to, and ratified by, the voters at the State Election of 1918 at the same time that the 48th Amendment was ratified, so modified the 48th Amendment as to exclude from the initiative machinery any measure in the form of a "law" which interferes with the constitutional provisions for the government of the financial affairs of the Commonwealth and the executive and legislative functions and procedure relating thereto or by making it practically impossible for the governor to prepare the state budget for the coming fiscal year as required by the Constitution and threatening to exhaust the sources and powers of taxation of the Commonwealth.

12. The 48th Amendment as amended by the 74th Amendment, adopted in 1944, provides that an initiative petition—

> "shall first be signed by ten qualified voters of the commonwealth and shall be submitted to the attorney-

general not later than the first Wednesday of the August before the assembling of the general court into which it is to be introduced, and if he shall certify that the measure and the title thereof are in proper form for submission to the people, and that the measure is not, either affirmatively or negatively, substantially the same as any measure which has been qualified for submission or submitted to the people at either of the two preceding biennial state elections, and that it contains only subjects not excluded from the popular initiative and which are related or which are mutually dependent, it may then be filed with the secretary of the commonwealth. The secretary of the commonwealth shall provide blanks for the use of subsequent signers, and shall print at the top of each blank a fair, concise summary, as determined by the attorney-general, of the proposed measure as such summary will appear on the ballot together with the names and residences of the first ten signers."

13. An "initiative" petition for a "law" signed apparently by ten "qualified voters" was submitted to the Attorney-General, together with the full text of the "proposed law," a copy of which is hereto annexed marked Exhibit A. (House Document No. 2142)

14. The Attorney-General, as appears in Exhibit A, prepared a summary of the proposed measure to appear on the blanks for signatures and on the ballot as follows:

"Summary

"This measure provides for minimum payments of seventy-five dollars per month, or eighty-five dollars per month if blind, as assistance to deserving aged persons who have reached the age of sixty-three years or over and are in need of relief and support."

15. The purpose of the constitutional requirement of "a fair concise summary" above referred to is to inform the petition signers of what they are signing and the voters what they are voting for when they cast their ballots on the question submitted as it is not to be assumed that either signers or voters know the existing law which they are asked to change.

16. The "summary" prepared by the Attorney-General was illegal and void because it was not "a fair summary" in that it did not inform the signers of the petition or the voters—

1. that the age for old age assistance was changed from 65 years to 63 years at public expense;
2. that the minimum rate of assistance was very greatly increased at public expense;
3. that the scope of old age assistance was changed from "citizens" to "persons," this including aliens, at public expense;
4. that the measure did not comply with the Federal plan of assistance under Title III, Section 6 of the Federal Security Act, and placed the whole burden of assistance of persons under the age of 65 on the Commonwealth without contribution from the Federal Government and might render uncertain the right of the Commonwealth and cities and towns to receive the contributions hitherto received under the existing Chapter 118A, from the Federal Government;
5. that by Section 11 the whole cost of assistance under the measure, above the amounts received from the Federal Government, is to be reimbursed to the cities and towns, instead of two-thirds as hitherto provided by Section 8 of Chapter 118A of the General Laws;
6. that the measure repealed the requirement of approval of rules and regulations of the department by the Governor and Council, inserted by Chapter 613 of the Acts of 1949;
7. that the measure repealed the provisions for payment to hospitals and nursing homes inserted by Chapter 343 of the Acts of 1950;
8. that Section 15 of the measure relieved adult children from liability to support of parents who are recipients under the measure;
9. that the measure contained a variety of other changes from the present law of serious concern, both to the commonwealth and its people, and to the applicants for, and recipients of, aid, as shown in detail by com-

parison of the sections in the present law with those in the initiative measure;

10. that it did not inform the signers and voters in any way that the measure interfered with the financial provisions of the 63rd Amendment to such an extent as to threaten the Commonwealth and the cities and towns with bankruptcy and thus deprive the aged of assistance.

17. The Attorney-General also certified, as appears in Exhibit A, as follows:

> "I hereby certify that the measure and the title thereof are in proper form for submission to the people, and that the measure is not, either affirmatively or negatively, substantially the same as any measure which has been qualified for submission or submitted to the people at either of the two preceding biennial state elections, and that it contains only subjects not excluded from the popular initiative and which are related or which are mutually dependent."

18. The certificate of the Attorney-General was mistaken and unconstitutional under the 74th Amendment because—

1. The measure and the title were not "in proper form for submission to the people" in that the title is inaccurate and misleading and the measure violates the constitutional financial and budgetary system of the 63rd Amendment, endangers the continuance of contributions from the Federal Government and changes the practical operation of the old age assistance law as indicated in paragraphs above of this petition and in Exhibit D, in ways which leave so much obscurity and so many uncertainties as to render the measure unworkable in practice for the cities and towns and for the commonwealth.

2. The certificate was mistaken and unconstitutional under the 74th Amendment because in fact a measure "substantially the same" and actually identical, in some respects, although much less expensive in its specified minimum rates of assistance, striking out Chapter 118A

and substituting a new chapter, was, while not "qualified for submission" because the Senate did not vote on it, actually "submitted" on the ballot and voted on at the State election in November 1946 with the resulting popular vote of 536,176 "yes" votes, and 568,026 "no" votes, with 610,793 blank ballots out of a total of 1,714,-994 ballots cast at the election, as appears in the volume containing the Acts of 1947, at pages 827-826.

3. The certificate was mistaken and unconstitutional in that the proposed measure contains "excluded subjects" because its dominant provisions specifically contain as the basis and condition of the award of old age assistance by the cities and towns of the Commonwealth, a mandatory provision in Section 11 thereof, on which cities and towns could rely, that—"Any town (which includes cities by Chapter 4 of the General Laws) rendering assistance under this chapter *shall* be reimbursed by the Commonwealth for all such disbursements"—and in Section 1, mandatory provisions that the age at which recipients shall be entitled to old age assistance from cities and towns shall be sixty-three years and that "such assistance shall be at not less than the following rates: seventy-five dollars monthly to each applicant and eighty-five dollars monthly to each blind applicant."

The Majority of the Committee on Pensions and Old Age Assistance reported to the General Court, as appears in Exhibit B hereto annexed, that:

> "Reliable estimates available to the Committee indicate beyond a reasonable doubt that House No. 2142 (Exhibit A hereto annexed) would add a minimum of $50,000,000 a year to the present $33,000,000 annually expended by the Commonwealth for old age assistance."

The exact amount of the money to be paid by the Commonwealth can only be estimated but the measure is so "specific" in its minimum provisions and its lowering of the age of recipients and extension to cover "persons," not "citizens," and its repeal of the liability of adult children to support parents,

and placing the whole cost on the Commonwealth, that the estimated minimum as stated by the Massachusetts Federation of Taxpayers Association in its "Tax Talk" for October 1950 was as follows:

"IMMEDIATE INCREASE IN COST TO STATE
IF QUESTION NO. 3 IS PASSED

"1. Lower the Age Limit from 65 to 63

It is estimated that approximately 10 per cent of the citizen population in the 63 to 65 age bracket would be eligible for Old Age Assistance and that the cost on the proposed basis would be $8,600,000. Since the Federal Government does not participate in Old Age Assistance under 65, the entire cost would have to be borne by the State.

"2. Making Aliens Eligible

It is estimated that, if the law were amended to make aliens eligible for Old Age Assistance, there would be approximately 20,000 such persons 65 years and older, who would be eligible with a total cost of $18,300,000, of which the Federal Government would contribute an estimated $7,000,000, leaving a net additional cost to the State of $11,300,000.

"In addition, it is estimated there would be approximately 4,500 aliens in the age group 63 to 65 who would be eligible at a total cost of $4,000,000 which would have to be borne entirely by the State. These two items total $15,300,000 net additional cost to the State.

"3. Guaranteed Minimum Income of $75 a Month

On an anticipated average annual case load of 103,000 recipients under the present law, it is estimated that to establish the guaranteed minimum income of $75 a month would add $12,000,000 to the cost. Of this, however, it is estimated that $2,400,000 would be paid by the Federal Government, leaving a net additional cost to the Commonwealth of $9,600,000.

"4. Eliminate 'Support Your Parents Clause'

The effect of this proposed change would be in two parts. First, it would increase the State's cost for those present cases

where adult children are contributing to the support of their parents. Second, it would open the way for a very substantial increase in case load, if it became known that the State was not going to investigate the ability of adult children to support their parents.

"It is estimated that if present contributions of adult children to the support of Old Age Assistance recipients were withdrawn, the additional cost to the State would be approximately $1,300,000.

"It has been estimated that if the requirement that adult children support their parents were withdrawn, the case load might increase approximately 13,000 at a total cost of $11,800,000. Of this latter figure, however, it is logical to assume that the Federal Government would contribute approximately $4,600,000 leaving a net cost to the State of $7,200,000 for the additional 13,000 cases.

The total of these two estimates is, therefore, $8,500,000.

"5. Eliminate Local Share of Cost

At the present time, cities and towns are paying out of local revenues approximately $12,000,000 as their share of the cost of Old Age Assistance. Under the proposed change this annual cost would have to be taken over by the Commonwealth."

From the foregoing, it appears that the estimated immediate annual increase in cost to the Commonwealth would be $54,000,000.

These specific mandatory provisions to reimburse cities and towns for the payment of money at the specified minimum rates and to the persons thus specified by wholesale, invade and interfere with "the general supervision of ways and means for the needs of the Commonwealth," which, as stated by this court, "was reserved to the General Court," to such an extent as to come within the excluding clause relative to "specific appropriations," which, as the court has said, is not to be narrowly interpreted.

Section 14 of the measure (see Exhibit A) is one, in the words of this court, to "permanently lay hold of and appropriate to a single public use the revenue derived" from specified sources of taxation as specified in said Section 14 and for

this additional reason it falls within the "matters excluded" from the initiative.

These mandatory provisions threaten cities and towns with bankruptcy if they make the disbursements and are not reimbursed by the Commonwealth because of the illegality of the measure or otherwise, and threaten the Commonwealth with bankruptcy if they are reimbursed as directed "from the treasury of the Commonwealth." A "law" thus specifically threatening the financial condition of the Commonwealth and its people in the cities and towns is "excluded" from the initiative and violates the 63rd Amendment. If it is not "a law" but a mere advisory proposal, it is not only "excluded," but it is not within the initiative power relating to "laws."

For these reasons the certificate of the Attorney-General was mistaken and illegal and void and the petition was illegal and void and was not legally filed with the Secretary or legally transmitted by him to the General Court, so that it was not legally introduced and pending and the subsequent signatures collected on said void petition did not authorize its being placed on the ballot or voted on by the voters at the State Election in November 1950.

19. The 48th amendment in "V" under the specific heading "Legislative Action on Proposed Laws" provided in Section 1, that "if an initiative petition *for a law* is introduced into the General Court signed "by the required signatures," a vote shall be taken by yeas and nays in both Houses before the first Wednesday of June upon the enactment of such law in the form in which it stands in such petition."

20. Regardless of this mandatory provision no vote of any kind "upon the enactment" was taken by either House.

21. The Secretary of the Commonwealth after the first Wednesday of June 1950, no vote having been taken as above stated, illegally and without Constitutional authority issued blanks (a copy of which is hereto annexed marked Exhibit C) for "subsequent signatures," so that the subsequent signers were without information, when they signed, of the legislative judgment of the elected representatives of all the people,

although a vote showing such judgment is required by the Constitution.

22. The 48th Amendment under the heading "General Provisions," "III Form of Ballot" and "IV Information to Voters," as amended in 1944 by the 74th Amendment, provides that the "summary" of the Attorney-General "shall be printed on the ballot" and the Secretary of the Commonwealth *shall* . . . cause such question to be printed on the ballot in the following form . . . "In the case of a law: Do you approve of a law summarized below (here state, in distinctive type *whether approved or disapproved by the General Court, and by what vote thereon?*)" and in "IV" that "the Secretary shall" send to each registered voter . . . *"a statement of the votes of the General Court on the measure."*

23. Notwithstanding the fact that no vote was taken by the General Court, the Secretary illegally and without constitutional authority caused the question to be printed on the ballot and in the information pamphlet sent to voters as follows:

> "Do you approve of a law summarized below on which the House of Representatives did not vote and on which the Senate did not vote?"

so that the voters at the election voted on the measure without information of the legislative judgment on the measure of the elected representatives of all the people, although a vote showing such judgment and information to each voter in advance of the election as to such vote is required by the Constitution.

24. Your petitioners believe and therefore aver that because of the facts hereinbefore alleged the initiative petition was illegal, the certificate and summary of the Attorney-General was illegal, the signature blanks issued by the Secretary were illegal, the transmission of the measure to the General Court was illegal, the failure of the two houses to vote was illegal, the measure was illegally placed upon the ballot and the popular vote on the measure was illegal and void and the measure was illegal and void and provides no constitutional authority for the respondent Treasurer and Receiver General to pay any money under this "measure" to reimburse the cities

and towns and no legal mandate to the General Court to raise funds by taxation or otherwise for that purpose and no legal authority for the respondent Commissioner or the department of which he is the head to act, and no legal authority to the cities and towns to expend money under this measure, for the purposes therein specified or to rely on reimbursement from the Commonwealth for any such expenditures.

25. Your petitioners believe, and therefore aver that the entire initiative proceeding and the "measure" proposed thereby being illegal and void as above specified, Chapter 118A of the General Laws is not repealed and is the present law regardless of the illegally initiated "measure."

Wherefore, in order to protect the people of the Commonwealth and the cities and towns and the Commonwealth from the disruption of their financial affairs by action and preparation for action in raising and spending enormous sums on and after the first day of June 1951 under the unconstitutional measure, your petitioners pray:

That this court issue a peremptory writ of mandamus commanding and directing the respondents to refrain from paying out any money or taking any action whatever, under the unconstitutional measure voted on at the November Election of 1950 which purports to enact the repeal of Chapter 118A of the General Laws as amended and to enact a substitute in place thereof.

(Signed by Petitioners)

Omitted Exhibits

A—House Doc. No. 2142 of 1950

B—House Doc. No. 2620 of 1950

C—Yellow blank for signatures

D—Comparison with G.L. Chapter 118A as amended

SUMMARY OF DEMURRER AND ANSWER OF RESPONDENTS TO THE PETITION FOR MANDAMUS (see p. 3)

Summary of Demurrer

"As pointed out in the first two grounds of the respondents' demurrer, this petition is so discursive, argumentative, and irrelevant as to constitute an imposition upon the parties respondent and upon the court.

"It is respectfully urged that this court sustain the respondents' demurrer on grounds numbered one and two because the petition is so improperly verbose and grossly argumentative as to be incapable of direct and specific traverse of its material allegations by the respondents in their answers and they ought not to be required to plead further to it.

"3. That the petition does not set forth any legal cause or reason for the issuance of a writ of mandamus, as prayed for, against the respondents.

"4. That the petitioners have not in their petition stated such a case as does or ought to entitle them to a writ of mandamus, as prayed for, against the respondents."

"5. That the remedy by mandamus is an extraordinary remedy which will not be granted where there is another adequate remedy and the petition does not allege that the petitioners do not have another adequate remedy."

"6. That if the petitioners have any cause of action in relation to the matter with which their petition is concerned they have a plain and adequate remedy under other provisions of law."

"7. That the allegations of the petition do not sustain the existence of any right or interest in the petitioners to maintain a petition for a writ of mandamus, as prayed for, in the premises hereof."

"8. That such allegations, if any, contained in the petition as to the right, power, duty, authority or intent of the respondents or either of them to take or refrain from taking the action or actions referred to in the petition or any other action are entirely insufficient to entitle the petitioners to

maintain the petition for a writ of mandamus, as prayed for, or otherwise, against the respondents or either of them."

Summary of Respondents' Answer

"Now come the respondents in the above-entitled matter and without waiving their demurrer previously filed, but expressly relying thereon, and protesting that, as more fully set forth in paragraphs numbered one and two of their demurrer, the petition is not susceptible of a direct and specific traverse of the essential allegations of fact, if any there are, contained therein, for answer say:"

The answer then follows substantially the lines of the demurrer, states certain facts, some of which are alleged in the petition and concludes as follows:

"The respondents say that these petitioners are barred by their own laches from now contending that any of the actions precedent to the approval by the people of the law here in question was irregular and not in accordance with the provisions of Article XLVIII, the INITIATIVE, and the amendment thereof of the Constitution of the Commonwealth.

"And the respondents say that upon the approval by the voters the law here in issue which was proposed by an initiative petition is now a law of the Commonwealth, the validity of the procedural steps in the adoption of which is not subject to judicial examination or review, and particularly the respondents say that the certificate of the Attorney General declaring, in accordance with the form prescribed by Amendment 74 to the Constitution, section 1, that the proposed law and its title 'is in proper form for submission to the people' is not a justiciable matter subject to review by this Court."

THE BAR ASSOCIATION DINNER OF DECEMBER 6, 1950

The merger of the Law Society with the Massachusetts Bar Association, announced in our November issue, was cheerfully celebrated at a largely attended dinner at the Parker House in Boston on December 6, 1950.

About four hundred members attended, filling the hall. President Sears presided as toastmaster. Hon. Francis X. Reilly,

president of the Law Society presented a check for $4,600 with which to establish the Law Society Scholarship Fund and it was accepted, on behalf of the Massachusetts Bar Association by Mayo A. Shattuck, former president.

The officers of both organizations were seated with other guests at the head table. They were all introduced by President Sears, with brief remarks, as follows:

William B. Sleigh, Jr.: "Our most accurate and highly efficient assistant secretary, without whom we could not very well do."

Frank C. Gorman: "For many years the treasurer and watchdog of the funds of the Law Society, whose prudent handling of the Society's monies has been responsible for the gift we are about to receive, and of which you will hear more later."

Frank W. Grinnell: "Our secretary for so long a time that memory of man runneth not to the contrary. A librarian, historian, secretary of the Judicial Council, a depository of the history of the Commonwealth and the development of its law, —indeed, Mr. Boston himself." (The last four words are a bit exaggerated. (F.W.G.)

Miss Bertha Kiernan: "The Law Society's very capable and devoted recording secretary. Our only lady head table guest but one we are really proud to have with us."

The Honorable John E. Fenton: "Our popular and genial senior judge of the Land Court who makes it regrettable that most of us seldom have business before him."

Joseph Schneider: "A formidable opponent in the pit, an organizer and an indefatigable worker for any association with which he is connected. His tact and judgment contributed importantly to the consolidation."

The Honorable Calvert Magruder: "The very personable and learned Chief Judge of our Circuit Court of Appeals."

Former Judge Charles C. Cabot: "The new president of the Boston Bar Association, whose generosity and enthusiasm for the public weal, will make cooperation between our two associations effective and enjoyable."

The Honorable Mr. Chief Justice Stanley E. Qua: "A former member of our distinguished Superior Court, now the Chief Justice of our Supreme Judicial Court, whose command of the law and deep devotion to his responsibilities assure us that his court will maintain its tradition as the high ranking court of our land."

The Honorable George C. Sweeney: "The Chief Judge of our Federal District Court, whose popularity was established last night at the Hotel Vendome."

Frank Auchter: "The present president of the Bar Association of Hampden County who will be our host at the mid-winter meeting in Springfield, for which an elaborate and exceedingly worthwhile program is being arranged. I know he extends a cordial invitation to all the members of our Association. The great success of last winter's meeting in Northampton is an indication of what is in store for us at Springfield."

The Honorable Frank L. Riley: "Senior Judge of the Central District Court of Worcester, Chairman of the Administrative Committee of the District Courts, and a member of the Judicial Council. A presider who is keenly aware that the District Courts are to a great degree responsible for the regard which the public has for our judiciary and our judicial system."

Paris Fletcher: "And last but not least our most efficient treasurer who spends our money reluctantly but always wisely."

The principal speakers were Hon. Raymond S. Wilkins of the Supreme Judicial Court, who spoke in what is called "lighter vein" and, after entertaining everyone, urged them to study the proposed new rules of the Supreme Judicial Court, printed in the November "Quarterly" and to send in any comments they wished to for the assistance of the court.

He was followed by Hon. James P. Mozingo, III, a trial lawyer in active practice and a state senator of South Carolina, who bubbled with amusing stories which kept the gathering, as well as the speaker, in continuous laughter. On that cheerful note the meeting adjourned.

THE LAWYERS REFERENCE SERVICE OF THE BOSTON BAR ASSOCIATION

With appropriate ceremonies held at the Boston Bar Association on January 11, 1951, and with brief remarks extended by Charles C. Cabot, President of the Boston Bar Association, Judge Calvert C. Magrudger of the U. S. Circuit Court of Appeals and Justice Edward Counihan of the Massachusetts Supreme Judicial Court, the Boston Bar Association formally embarked upon its Lawyers Reference Service following the experiments tried in other cities. The service is sponsored by the American Bar Association and by the Survey of the Legal Profession and is created as a public service to provide qualified legal advisers for persons who have no lawyer, want one, and can pay moderate, reasonable fees for legal services. The lawyer charges the client $5.00 for the first brief consultation. Fees for additional services are agreed on by lawyer and client, who also agree that any dispute shall be settled by decision of the Reference Service Committee. The Referral Group of attorneys listed as lawyers to whom persons of moderate means who do not know an attorney may be referred, already includes more than 400 lawyers who have applied for listing. As well as having a large proportion of general practitioners, the list includes attorneys who are specialists in various fields. We extend best wishes for this public service undertaking and await the results with great interest. As the plan is not always understood, we may print the by-laws in our next issue for information of the profession.

THE 26th REPORT OF THE JUDICIAL COUNCIL OF MASSACHUSETTS

From 1925 to 1948, all the annual reports of the Judicial Council appeared in the "Quarterly" in full, including the statistical appendix showing in detail the business of the various courts.

In view of the rise in costs and of the fact that most of our readers are, probably, not interested in statistical information, in the December issue for 1949 and again in this issue, we have reprinted only the report and Appendices A and B which contain information likely to be helpful to the bar in practice.

Anyone wishing to see Appendix C containing the "Summary of the Work" of all the courts with statistics, may obtain the full report by writing to the Public Document Room, State House, Boston, Mass.

Editor

Public Document

No. 144

TWENTY-SIXTH REPORT
Judicial Council of Massachusetts
For the Year 1950

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Publication of this Document Approved by George J. Cronin, State Purchasing Agent.
2400-19-50-902891

STATISTICAL INDEX TO APPENDIX C

The Commonwealth of Massachusetts

DECEMBER, 1950

To HIS EXCELLENCY, PAUL A. DEVER

Governor of Massachusetts

In accordance with the provisions of section 34B of chapter 221 of the General Laws (Ter. Ed.) we have the honor to transmit the twenty-sixth annual report of the Judicial Council for the year 1950.

FRANK J. DONAHUE, *Chairman,*
WILFRED J. PAQUET, *Vice-Chairman,*
LOUIS S. COX,
JOHN E. FENTON,
JOHN C. LEGGAT,
DAVIS B. KENISTON,
FRANK L. RILEY,
FREDERICK J. MULDOON,
REUBEN L. LURIE,
CHARLES W. BARTLETT.

ACTS OF 1924, CHAPTER 244

As amended by St. 1927, c. 923, St. 1930, c. 142, and St. 1947, c. 601
Now appearing as G. L. (Ter. Ed.) Ch. 221, §§ 34A-34C

AN ACT PROVIDING FOR THE ESTABLISHMENT OF A JUDICIAL COUNCIL TO MAKE A CONTINUOUS STUDY OF THE ORGANIZATION, PROCEDURE AND PRACTICE OF THE COURTS.

Be it enacted, etc., as follows:

Chapter two hundred and twenty-one of the General Laws is hereby amended by inserting after section thirty-four, under the heading "Judicial Council," the following three new section—*Section 34A*. There shall be a Judicial council for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the commonwealth, the work accomplished, and the results produced by that system and its various parts. Said council shall be composed of the chief justice of the supreme judicial court or some other justice or former justice of that court appointed from time to time by him; the chief justice of the superior court or some other justice or former justice of that court appointed from time to time by him; the judge of the land court or some other judge or former judge of that court appointed from time to time by him; the chief justice of the municipal court of the city of Boston or some other justice or former justice of that court appointed from time to time by him; one judge of a probate court in the commonwealth and one justice of a district court in the commonwealth and not more than four members of the bar all to be appointed by the governor, with the advice and consent of the executive council. The appointments by the governor shall be for such periods, not exceeding four years, as he shall determine.

Section 34B. The Judicial council shall report annually on or before December first to the governor upon the work of the various branches of the judicial system. Said council may also from time to time submit for the consideration of the justices of the various courts such suggestions in regard to rules of practice and procedure as it may deem advisable.

Section 34C. No member of said council, except as hereinafter provided, shall receive any compensation for his services, but said council and the several members thereof shall be allowed from the state treasury out of any appropriation made for the purpose such expenses for clerical and other services, travel and incidentals as the governor and council shall approve. The secretary of said council, whether or not a member thereof, shall receive from the commonwealth a salary of five thousand dollars.

MEMBERS OF THE COUNCIL

FRANK J. DONAHUE of Boston, *Chairman*
WILFRED J. PAQUET *of Watertown*

LOUIS S. COX of Lawrence
JOHN E. FENTON of Lawrence
JOHN C. LEGGAT of Lowell
DAVIS B. KENISTON of Boston
FRANK L. RILEY of Worcester
FREDERIC J. MULDOON of Winthrop
REUBEN L. LURIE of Brookline
CHARLES W. BARTLETT of Dedham

FRANK W. GRINNELL, *Secretary*, 60 State St., Boston

TWENTY-SIXTH REPORT OF THE JUDICIAL COUNCIL OF MASSACHUSETTS

To His Excellency

PAUL A. DEVER

Governor of Massachusetts

The Judicial Council was created by St. 1924, Chapter 244 (*See copy printed on opposite page*), "for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the Commonwealth, the work accomplished and the results produced by that system and its various parts."*

Since the last report the term of Samuel P. Sears expired and Charles W. Bartlett of Dedham was appointed by Your Excellency as a member of the Council for a four year term. Wilfred J. Paquet was chosen vice-chairman by the Council.

RECOMMENDATIONS ADOPTED IN 1950

During the last session of the legislature the following recommendations were adopted by the legislature. The recommendations adopted appear in the statute book for 1950 as:—

Chapter 119, increasing entry fees in the Supreme Judicial and Superior Courts and before county commissioners from $3 to $5, and in the District courts, for cases, other than Small Claims, from $1 to $2. This is the first change since 1884 and was recommended in the 25th report in view of the rising cost of the administration of justice, for reasons stated, at length, on pages 7-14 of that report (reprinted in 34 Mass. Law Quarterly No. 5, December, 1939). This was followed by Chapter 500 providing the same entry fee of $5.00 for entry in the Superior Court of cases removed from the District Courts.

Chapter 589, increasing certain fees in the Land Court. This was recommended in the 25th report p. 19 "because of the increased cost of clerical and engineering services and of the postage involved in the items to which the fees applied".

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* In 1925, the legislature also submitted the following request to the council.

1925 RESOLVES, CHAPTER 27

"Resolved, That the judicial council is hereby requested to investigate ways and means for expediting the trial of cases and relieving congestion in the dockets of the Superior Court, and among other things . . . ways and means for encouraging, so far as consistent with constitutional rights, trials without jury . . . and any other ways and means that may appear feasible to said council for improving and modernizing court procedure and practice so that, consistently with the ends of justice, the proverbial delays of the law and attendant expense, both to litigants and the general public, may be minimized. (Approved April 24, 1925.)"

Chapter 387, relative to equitable replevin (see 25th report p. 28).

Chapter 390, relative to ancillary probate of a will (for reasons see 25th report pp. 26-27).

Chapter 391, relative to concurrent jurisdiction of the Superior Court in connection with revival of actions against executors and administrators (see 25th report p. 40).

Chapter 420 relative to jurisdiction of the probate courts to appoint successor guardians (see 25th report p. 41).

Chapter 426 constituting pleas of guilty or verdicts of guilty in felony cases, convictions of crime for the purpose of affecting the credibility of witnesses (see 25th report p. 39 for reasons).

Chapter extending the concurrent jurisdiction of the probate Courts relative to the support of poor persons by "kindred" under various statutes (see 25th report p.p. 35-36).

The negative recommendations of the Council as to certain other matters on which reports were requested by the legislature, were followed.

Reports Requested by the Legislature in 1950

This year the "subject matters" of nine bills, pending before the legislature, were referred to the Council with requests for a report, as follows:—

House 810—Relative to waiver of wills (referred by Resolves, Chapter 4).

House 1241—Relative to apportionment of damages due to contributory negligence (referred by Resolves, Chapter 5).

House 1709—Relative to procedure for the foreclosure of tax-titles (referred by Resolves, Chapter 6).

House 1722—To provide for enforcement of decrees for alimony and non-support by registers of probate (referred by Resolves, Chapter 8).

House 1727—Relative to recording conditional sales of personal property (referred by Resolves, Chapter 12).

House 1306—Relative to the discharge of mortgages (referred by Resolves, Chapter 13).

Senate 33—Relative to trespass (referred by Resolves, Chapter 15).

House 2333—To require insurance companies to disclose motor vehicle insurance coverage in excess of the required minimum (referred by Resolves, Chapter 18).

House 220—Relative to adoption proceedings (referred by Resolves, Chapter 27).

We discuss these matters in this report.

The Cost of Juries and the Proposal for a Fee for a Jury of Twelve and a Lower Fee for a Jury of Six.

In the 23rd, 24th and 25th reports we discussed the rising public cost of the administration of justice (which has been the subject of repeated discussions for about twenty years), and recommended moderate increases in fees to lessen the burden of public expense carried by the counties for the benefit of the small minority of the population who are concerned in litigation. The legislature followed the recommendation by chapter 119 of 1950 increasing the entry fees in the Superior Court from $3 to $5 and in the district courts for cases other than small claims from $1 to $2. The fee for small claims was left at $1, as provided by G. L. c. 218 §§ 21-25. Entry fees for cases removed from the District Courts were also raised to $5 by chapter 500.

As stated on p. 14 of the 25th report, the over-all public cost of jury trials alone in 1947 was estimated as about $1,224,000 and on pp. 16-17 of the 25th report, tables appear showing the total amounts paid to jurors in 1948 for compensation and travel in each county for civil and criminal cases making a total of $739,100.50. By chapter 335 of 1949 the daily compensation of jurors was increased from $6 to $8, thus raising the probable public cost of jurors alone to almost $1,000,000. In view of these facts we said,

> "It is no disparagement of the right to jury trial to suggest that the taxpayers deserve some slight consideration in the light of these figures."

We, therefore, recommended a fee for a claim of trial by a full jury of twelve in civil cases of $15 and a lower fee of $5 for a claim of a jury of six, and in connection with that recommendation we stated that

"We believe many litigants would be satisfied with a trial before a jury of six. . . . We believe such a provision would result in a substantial public saving to the various counties by the use of smaller juries. The extent of such savings can be ascertained only by trying the experiment. The whole situation will be optional. The mechanics of the plan can be worked out by the court by having a separate list of cases for juries of six so that the number of jurymen needed might be estimated. It can do no harm to provide for it and, we, therefore, recommend it."

For the same reasons we again renew the recommendation and submit the following

DRAFT ACT

Section 1. Section 4 of chapter 262 of the General Laws, as most recently amended by chapter 119 of the acts of 1950 is hereby further amended by inserting therein the following:—

"For filing a claim for jury trial, or a motion to frame issues in the Superior Court for jury trial, or for the entry in the Superior Court of such issues framed by the Land Court, or by a Probate Court, and transmitted to the Superior Court, for trial, *fifteen* dollars, but, if a claim is made, or a motion is made, or issues thus transmitted, for a trial by a jury of six, instead of a full jury of twelve, *five* dollars."

Section 2. Section 60 of Chapter 231 of the General Laws is hereby amended by substituting there for the following:—

"Section 60. Separate lists of cases to be tried by jury, *and by a jury of six,* shall be kept in the Superior Court and no action shall be entered thereon, except as otherwise expressly provided, unless a party, before issue joined, or within ten days after the time allowed for filing the answer or plea, within ten days after the answer or plea, has, by consent of the plaintiff or permission of the court, been filed, or within such time after the parties are at issue as the court may by general or special order direct, files a notice that he desires a jury trial, *or a trial by a jury of six;* but in a case in which damages are demanded, the court may of its own motion refer the assessment thereof to a jury."

Judgment on Issues in Actions of Contract which there is no Dispute of Fact.

A bill on this subject (House 486 of 1948) was referred to the Council by Resolves Chapter 6 of 1948. The Council revised the bill and recommended a new draft in its 24th report in 1948. It was not adopted and the Council renewed its recommendation in its 25th report. This year the bill was reported favorably by the Judiciary Committee, passed the House and was ordered to a 3rd reading in the Senate. It was then referred to the next legislative session.

For the reasons stated in our 25th report (pp. 24-25) we, again, recommend the passage of this bill.

For many years the legislature has been considering the problems of reducing delay and unnecessary waste of time in the disposition of judicial business, and suggestions have been made in the reports of the Council, many of which have been adopted. The volume of cases for trial, somewhat reduced during the war, is again increasing at increasing expense to the public and to litigants. It would seem clear that reasonable procedure to avoid both expense and waste of time of courts should be provided wherever possible.

The proposed bill is one of the methods of accomplishing this result in cases in which there are no disputes of fact, but only questions of law for decision, and it applies only to actions of contract. As pointed out in the 25th report, experience with such procedure in New York, Michigan, Illinois and under the Federal rules has proved effective. The bill which we recommend is specially guarded in its wording by the words printed, in italics in the draft submitted herewith. No one has a right to a trial of facts which are undisputed and the bill emphasizes the fact that it is applicable only to undisputed facts. We recommend the following:

DRAFT ACT

AN ACT TO PERMIT SUMMARY JUDGMENT ON ISSUES IN WHICH THERE IS NO DISPUTE OF FACT IN ACTIONS OF CONTRACT.

SECTION 1. Chapter 231 of the General Laws is hereby amended by striking out section 59 and the caption immediately preceding it, as appearing in the Tercentenary Edition, and inserting, under the caption MOTIONS FOR SUMMARY JUDGMENT, the following section:—

Section 59. In any action of *contract, except an action against an executor or administrator for liability of the deceased,* at any time after the completion of the pleadings counsel for either party may file an affidavit that in his belief *there is no genuine issue of material fact but only questions of law* in connection with all or some part of the action, or of some issue determinative thereof, and move for an immediate entry of judgment thereon. Said motion may be accompanied by affidavits on personal knowledge of admissible facts as to which it appears *affirmatively* that the affiants would be competent to testify. The facts stated in the accompanying affidavits shall be taken to be admitted for the purpose of the motion unless within twenty-one days, or such further time as the court may order, contradictory affidavits are filed, or the opposing party shall file an affidavit showing specifically and clearly reasonable grounds for believing that contradiction can be presented at the trial but cannot be furnished by affidavits. Copies of all motions and affidavits hereunder shall be furnished upon filing to opposing

counsel. If admissions in the pleadings, interrogatories, admissions under chapter two hundred and thirty-one, section sixty-nine, stipulations or *affidavits* hereunder *show affirmatively, that* except as to the amount of damages *no genuine issue of material facts exists and that there is nothing to be decided except questions of law,* an order for default, or judgment for the moving party, shall forthwith be entered *if he shall be entitled thereto as a matter of law,* subject to an assessment of damages, if required.

SECTION 2. Said chapter 231 is hereby further amended by striking out section 59A, as so appearing, and inserting in place thereof, under the caption ADVANCING CAUSES FOR SPEEDY TRIAL, the following section:—

Section 59A. In any action at law or suit in equity in the supreme judicial court or in the superior court, the court may on motion for cause shown advance said action or suit for speedy trial. If, in an action removed by the defendant from a district court, the court is satisfied, upon an inspection of the declaration, that the plaintiff seeks to recover solely for his personal labor, with or without interest, the court shall, upon motion, advance such action for speedy trial.

NOTE

Section 2 of the bill does not change the law, but merely transfers a sentence now in Section 59 to Section 59A where it belongs.

CONTRIBUTORY NEGLIGENCE IN CLAIMS FOR CONSEQUENTIAL DAMAGES

Section 85 of G. L. Chapter 231, as amended by Chapter 386 of 1947, now provides:

"Section 85. In all actions, civil or criminal, to recover damages for injuries to the person or property or for causing the death of a person, or consequential damages arising out of such injuries or death, the person injured or killed or the person chargeable with his conduct shall be presumed to have been in the exercise of due care, and contributory negligence on his part shall be an affirmative defence to be set up in the answer and proved by the defendant."

Section 85D, inserted by Chapter 352 of the Acts of 1945, provides:

"Section 85D. In all actions to recover damages for injury to the person or property of an infant, the negligence of the parent or other custodian of the infant shall not be imputed to the infant from the facts of such parenthood or custodianship."

These two sections do not place the burden on the defendant of proving contributory negligence in all claims for consequential damages (See Mendolia v. White, 313 Mass., 318, at p. 321). We think they should all be covered and recommend the following draft act, which, if passed, will make Section 85D above quoted unnecessary.

DRAFT ACT

Section 1. Section 85 of Chapter 231 of the General Laws as amended by Chapter 386 of the Acts of 1947 is hereby amended by striking out the same and substituting the following:

Section 85. In all actions, civil or criminal, to recover for death, personal injuries, damages to property or consequential damages, the burden of proving contributory negligence on the part of the person killed or injured or damaged in his property, or caused to sustain consequential damages, or of his agent or custodian or any other person whose conduct is imputed to him, shall be an affirmative defence to be set up in the answer and proved by the defendant.

Section 2. Section 85D of said Chapter (inserted by Chapter 352 of the Acts of 1945) is hereby repealed.

Transfer of District Court Cases to a Proper District When Begun in the Wrong District

If a suit is begun in the Supreme Judicial or the Superior Court in the wrong county, Section 15 of Chapter 223 of the General Laws provides that the court may transfer it to the proper county for trial. This section does not apply to the district courts. A Probate Court may also order a transfer (see G.L. 215 s. 8A). In these days when people frequently move from one place to another it may be difficult to know the legal residence of a defendant and if a mistake appears we see no reason why the law should provide that it can be cured by transfer in some court but not in others. Under the present statutes a plaintiff in a district court may, because of a mistake in locating a defendant correctly, be caught in such a way as to lose the benefit of an attachment or otherwise. By Section 32 of Chapter 260 he is protected from the bar of the Statute of Limitations for one year during which he can begin a new suit in the proper district, if the defendant does not waive the question by a general appearance. We see no reason, however, why either the plaintiff, or the clerk's office, for a mere mistake in the place of suit, should be subjected to possible loss and the necessity of filing more papers in another court, thus cluttering up the court files and requiring new service of process when the waste of time, money and clerical burden can be avoided by a mere transfer of the case and the papers on payment of a second entry fee to the court to which the case is transferred.

Section 4A of Chapter 246 (inserted by St. 1921 c. 417) protects a defendant in an action begun by trustee process as follows:

4 a Change of venue in District Courts. Whenever an action is commenced by trustee process in a district court in the district in which the party named in

the writ as trustee lives or has his usual place of business, which could not be brought in that district except because of the residence or place of business of the trustee, the court may on motion of any party thereto transfer such action for trial and final disposition to any other district court in which the action might have been commenced had there been no trustee named in the writ. (1921, 417.)

We think the plaintiff should have a similar opportunity of transfer in case of an error as to the place of suit on payment of an additional entry fee for entry in the proper court. Bringing a case in the wrong district court appears to invoke a question of venue which may be waived and not of jurisdiction (See Paige v. Sinclair 237 Mass. 482) but, to avoid misunderstanding on this point, we recommend the following:

DRAFT ACT

Chapter 218 of the General Laws is hereby amended by inserting, after Section 2, the following new Section:

Section 2A. Each district court shall have civil jurisdiction of actions local or transitory begun in such court which should have been brought in some other district court, to the extent that the court in which the action is begun may try and dispose of the case if the question of venue is waived or, if not waived, the court may, on motion of any party, order the action with all papers relating thereto, transferred for trial or disposition to any other district court in which the action might have been commenced and it shall, thereupon, be entered and prosecuted in such court as if it had been originally commenced therein and all prior proceedings otherwise regularly taken shall, thereafter, be valid. An additional entry fee for entry in the court to which the case is transferred shall be paid to the clerk of the transmitting court for transfer with the papers.

Removal of Cases from District Courts Without Claim of Jury Trial

The present statutes—sections 104 and 105 of Chap. 231 of the Gen. Laws as amended by chapter 316 of 1929 and chap. 426 of 1931 provide an action begun in the district court for an amount not exceeding the jurisdictional amounts as of September 1, 1929 (i.e. $5,000 in the Municipal Court of the City of Boston and $3,000 in all other district courts) may be removed to the superior court by a defendant, only if a jury trial is claimed. If the amount involved exceeds those limits the case may be removed to the superior court for trial "with or without jury". While the requirement of a jury claim for removal may have been advisable originally when the removal system was first provided for in 1912 and until the jurisdictional limits were removed in 1929, we think it is no longer advisable to require a jury claim in some cases and

not in others. We think it may stimulate claims for jury trial which is not really desired. We, therefore, recommend that all cases may be removed without a jury claim. This change will eliminate the need of Section 105 and we see no need of retaining Sections 2, 3 and 4 of the same chapter as joinder of parties is more fully covered by Chapter 350 of the Acts of 1943. We recommend the following:

DRAFT ACT

AN ACT TO ELIMINATE THE NECESSITY OF A CLAIM FOR JURY TRIAL IN ORDER TO REMOVE A CAUSE FROM THE DISTRICT COURTS

Section 1. Section one hundred and four of chapter two hundred and thirty-one of the General Laws is hereby amended by striking out said section and substituting the following:

Section one hundred and four—No other party to such action shall be entitled to an appeal. In lieu thereof any defendant may within two days after the time allowed for entering his appearance file in said court a claim of trial by the Superior Court together with the sum of five dollars for the entry of the cause ofeach plaintiff in the Superior Court, and, except as provided in section 107 as amended, a bond in the penal sum of one hundred dollars, with such surety or sureties as may be approved by the plaintiff or the clerk or an assistant clerk of said district court payable to the other party or parties to the cause conditioned to satisfy any judgment for costs which may be entered against him in the Superior Court in said cause within thirty days after the entry thereof. The clerk shall forthwith transmit the papers and entry fee to the clerk of the Superior Court, except that if such trial by the Superior Court is not claimed as to some parties to the action, the district court shall retain jurisdiction as to those parties, and the clerk shall transmit attested copies of the papers in lieu of the originals. Any case removed to the Superior Court under this section shall proceed as though originally entered there.

Section 2. Sections two, three, four and one hundred and five of chapter two hundred and thirty-one are hereby repealed.

CONCURRENT JURISDICTION OF THE SUPERIOR COURT

Following discussions of many years and recommendations of the Judicature Commission in its Final Report in 1920 and of the Judicial Council in its 13th and 14th reports, the concurrent jurisdiction of the Superior Court (by chap. 257 of the acts of 1939) was extended to cover various prerogative writs and matters of equity formerly in the "original and exclusive" jurisdiction of the Supreme Judicial Court. The purpose of the act was to relieve the Supreme Judicial Court of work which interfered with

its appellate work and could be properly dealt with in the first instance by the Superior Court. The class of cases to which the concurrent jurisdiction was thus extended was defined in the act. The act of 1939 was amended by chapters 28 and 180 of 1941 restoring such "exclusive jurisdiction" which the Supreme Judicial Court had of matters relating to banking and insurance under chapters 168, 172, 175, 176 and 178. We respectfully suggest that this action of 1941 was a mistaken policy but we are not now concerned with that.

The present statute (section 1A of chap 213, as thus amended), reads in part—

> "Section 1A. The superior court shall have original jurisdiction, concurrently with the supreme judicial court, of all proceedings relating to habeas corpus, certiorari, quo warranto and informations in the nature of a quo warranto, mandamus (except a writ of mandamus to a court or a judicial officer), and also of all matters relating to the dissolution of corporations, *and of all cases and matters of equity of which the supreme judicial court has had exclusive original jurisdiction under section two of chapter two hundred and fourteen or otherwise, . . .*"

Then follows the list of exceptions.

As indicated in italics the act reads "and of all cases and matters of equity of which the Supreme Judicial Court *has had* exclusive original jurisdiction under section two of chapter 214 *or otherwise,* other than, etc.

The unfortunate words "has had" appear to fix the date as of 30 days from April 11, 1941, when the act was approved.

Since 1941 a number of statutes have been passed providing for enforcement by a court and the Supreme Judicial Court is mentioned without a provision for concurrent jurisdiction of the superior court. For instance sec. 77 of chap. 130 inserted by St. 1941 chap. 598 s. 1, relates to enforcing rules as to pollution of shell fish against cities and towns. We see no reason why this sort of thing should be loaded on to the Supreme Court. We have been furnished by the commissioners to revise the General Laws with a considerable list of statutes, passed since 1939, specifying the Supreme Judicial Court, only, as the tribunal for enforcement proceedings and we are informed that their report to the legislature of 1951 will probably contain recommendations for amending most of these, as well as earlier statutes listed in an article in the "Bar Bulletin" for May 1941 (pp. 104-108), by providing for concurrent jurisdiction where there is no sufficient reason for exclusive jurisdiction.

We recommend careful consideration of such suggestions as we think the policy gradually developed and specially emphasized by the act of 1939 of protecting the time and strength of the court of last resort for the adequate performance of its appellate work, is a sound policy in the public interest.

It is, of course, easy, in the midst of many legislative questions to overlook the need of providing for concurrent jurisdiction in order to maintain this policy and, to guard it, we suggest a general provision in the chapter 4 of the General Laws, containing definitions, as follows.

DRAFT ACT

Chapter 4 of the General Laws is hereby amended by inserting at the end of section 7, the following new clause.

Supreme Judicial Court—When to Have Concurrent Jurisdiction—Words conferring original jurisdiction or jurisdiction of appeals from an administration board or officer on the Supreme Judicial Court shall be held to mean concurrent jurisdiction with the superior court unless it is expressly provided that such jurisdiction of the Supreme Judicial Court is to be exclusive.

Senate 33 about Trespass.

By Resolves chapter 15 the subject matter of Senate 33 was referred to the Council with a request for a report. The bill to render "more effective the remedies against certain trespassers" is printed in a footnote on p. 16.* It would increase from twenty to fifty dollars the penalty for violation of section 120 of chapter 266 of the General Laws, as amended by section 45 of chapter 426 of the acts of 1931, which now provides a penalty. This section first enacted in 1862 for the protection of fruit trees, etc. was gradually broadened to include other trespasses on improved land after notice not to do so. With the coming of motor cars such trespasses often take the form of the prolonged parking of cars in private ways, or on private premises, regardless of notices. The proposed law would include this parking trespass, specifically, in section 120 and stiffen the penalty which the court may impose when the facts of the trespass, or repeated, or defiant, trespass warrant a higher penalty.

We recommend the passage of the bill in the following revised

DRAFT ACT (new matter printed in italics)

An Act rendering more effective the remedies against certain trespassers.

Section 120 of chapter 266 of the General Laws as appearing in the Tercentenary Edition is hereby amended by striking out the same and substituting the following:—

Section 120. Whoever, without right, enters or remains in or upon the

dwelling house, buildings, boats or improved or enclosed land, wharf or pier of another, *or private ways so designated by a posted notice,* after having been forbidden so to do by the person who has the lawful control of said premises, either directly or by notice posted thereon, *or whoever shall allow, permit or suffer any vehicle registered in his name to stand or park in such improved or enclosed land, wharf or pier of another, or private ways so designated by a posted notice, or whoever as driver of a vehicle shall so do, after having been forbidden so to do as aforesaid shall be punished by a fine of not less than ten dollars nor more than one hundred dollars.*

In any proceeding for violation of this section, evidence that at the time of such parking the vehicle was registered in the name of the defendant as owner shall be prima facie evidence that it was parked by and under the control of a person for whose conduct the defendant was legally responsible. A person who is found committing such trespass may be arrested by a sheriff, deputy sheriff, constable or police officer and kept in custody in a convenient place, not more than twenty-four hours, Sunday excepted, until a complaint can be made against him for the offence, and he be taken upon a warrant issued upon such complaint.

H. 220 Relative to Adoption Proceedings

The subject matter of this bill was referred to the Council by Resolves Chapter 27. The bill reads:

"An Act Relative to a Father's Liability, in Adoption Proceedings, to Support His Minor Children.

"Chapter 210 of the General Laws is hereby amended by adding to section 3 the following new paragraph:—

"For the purposes of this section the common-law duty of a father to support his minor child shall continue notwithstanding any court decree granting custody of such child to another; provided, however, that where such decree stipulates an amount to be paid by him for said child's support he shall not be obligated in excess of that amount."

FOOTNOTE TO P. 15—S. 33 AS REFERRED TO THE COUNCIL.

* Section 120 of chapter 266 of the General Laws, as most recently amended by section 45 of chapter 426 of the acts of 1931, is hereby further amended by striking out, in the sixth line, the word "twenty" and inserting in its place the word: — *fifty,* — and by inserting after the first sentence thereof the following new sentences: — *No person shall allow, permit or suffer any vehicle registered in his name to stand or park in such improved or enclosed land, wharf or pier of another. In any proceeding for violation of this section, evidence that at the time of such parking the vehicle was registered in the name of the defendant as owner shall be prima facie evidence that it was parked by and under the control of a person for whose conduct the defendant was legally responsible.,* — so as to read as follows: — Whoever, without right, enters or remains in or upon the dwelling house, buildings, boats or improved or enclosed land, wharf or pier of another, after having been forbidden so to do by the person who has the lawful control of said premises, either directly or by notice posted thereon, shall be punished by a fine of not more than *fifty* dollars. *No person shall allow, permit or suffer any vehicle registered in his name to stand or park in such improved or enclosed land, wharf or pier of another. In any proceeding for violation of this section, evidence that at the time of such parking the vehicle was registered in the name of the defendant as owner shall be prima facie evidence that it was parked by and under the control of a person for whose conduct the defendant was legally responsible.* A person who is found committing such trespass may be arrested by a sheriff, deputy sheriff, constable or police officer and kept in custody in a convenient place, not more than twenty-four hours, Sunday excepted, until a complaint can be made against him for the offence, and he be taken upon a warrant issued upon such complaint.

The bill was introduced by Judge Hanlon of the Berkshire Probate Court at the suggestion of probate judges. The statement of the reasons for the bill, submitted to the Council follows:

Letter from Judge Hanlon, petitioner for H. 220

"The purpose of this bill is to add a sentence to Section 3 of Chapter 210 so as to enable a couple to adopt a child against the wishes of the child's father if he has wilfully deserted or neglected to provide proper care and maintenance for said child for one year next preceding the date of the adoption petition.

"Section 3, as it now stands, seems, at first blush, to cover this situation, but as a result of the decision in Broman v. Byrne, 322 Mass. 578, there is a rather glaring loophole. In that decision the Court said 'If the father is deprived of the custody of his child by order of the Court, the common law duty to support ceases and, apart from statute, his obligation in this respect is then to be determined by judicial decree. In the present case, after the custody of the child was given by decree to the petitioner, in the absence of any order of Court the respondent was no longer liable for its support . . . Since the respondent has not consented to the proposed adoption and it does not appear that he has wilfully deserted or neglected to provide proper care and maintenance for the child in accordance with the provisions of Chapter 210, Section 3, the decree is reversed and a decree is to be entered dismissing the petition'.

"In other words, what this case says is that the father of a child whose custody has been given to the mother (or some third party) is only obligated to support it to the extent ordered by the Court in the custody proceedings.

"But here is the difficulty: It has long been the law that no alimony or support order may be entered against a libellee or respondent unless he is personally served within the Commonwealth, or unless his property within the Commonwealth has been attached. Schmidt v. Schmidt, 280 Mass. 216 at 219; Parker v. Parker, 211 Mass. 139; Pennoyer v. Neff, 95 U. S. 714.

"Consequently a man who is divorced by his wife but who was outside the Commonwealth so that personal service on him within the Commonwealth was impossible, can decline to give any support whatsoever to his child for one year or for *ten* years and can still prevent that child from being adopted. No order for support could be made against him because he was not served with process within the Commonwealth, and so by the doctrine of Broman v. Byrne he has not been guilty of deserting or neglecting to provide proper care and maintenance for his child within the meaning of Section 3 of Chapter 210.

"The proposed bill is designed to cover just such a situation as arose in Broman v. Byrne and to require a father to support his child whether it is in his custody or the custody of another or else submit to its adoption. He should not be permitted to block a good adoption when he himself will not support the child.

"I know of no other way to overcome the situation arising out of the decision in Broman v. Byrne. If there is any other way, I would, of course, be in favor of it if it is preferable to House Bill No. 220."

The purpose of the bill seems to us a good one. In the case of Broman v. Byrne, referred to, the wife was granted a divorce and sole custody of the child, but without any order or support against the divorced husband. She married again, and then *with her second* husband petitioned for adoption of *her own child*. The adoption was not allowed for the reasons stated.

The case of Barry v. Sparks, 306 Mass. 80 at pp. 83-84 says that after a divorce decree if the wife dies the "common law liability" revives. Also there is the parallel statutory liability under G.L. c. 117 s. 6 which has existed ever since 1692 (see 25th report of Judicial Council, reprinted in M.L.Q. for Dec. 1949, pp. 33-34). The act recommended on p. 35 has become chapter 485 of 1950. In Dumain v. Gwyne, 10 Allen 270 the court enforced an adoption agreement made by the wife without the husband while he was in jail. The cases all say the interest of the child is paramount. See Stimson v. Meegan, 318 Mass. 459. In Foss v. Hartwell, 168 Mass. 66, 67 the court left undecided whether the liability to support was legal or moral. Since then the court has said it is a common law liability. Following the idea applied in Dumain v. Gwyne as to the paramount interest of the child, if the sole custody has been given by decree to one parent or a third person (such as a grandmother) without an order for support by the father, we think the court should be in a position, if the facts found justify it, to allow the adoption without his consent, as was done in the Gwyne case because of the interest of the child. We therefore, recommend the following.

DRAFT ACT

Section 1. Section 3 of chapter 210 of the Gen. Laws as amended by chap. 239 of the Acts of 1945 is hereby amended by inserting after the word "commonwealth" in the seventh line thereof the words, "or of the United States or any other state or territory thereof", and by inserting after the word "petition" in the 11th line thereof the following:

"or if the lawful parents of the child have been divorced or separated by judicial decree and the sole custody of the child awarded by judicial decree to one of the parents or some other person without an order of support by the other parent and if such decree is still in force and such other parent has wilfully neglected to contribute voluntarily a proper amount for the care and maintenance of the child for one year immediately preceding the date of the filing of the petition." So that the section shall read as follows *(the words inserted being printed in italics)*.

"Section 3. Consent Not Required in Certain Cases; Notice of Petition if Child Supported by Town, etc.—The consent of the persons named in section two, other than the child or her husband, if any, shall not be required if the person to be adopted is of full age, nor shall the consent of any such person other than the child be required if such person is adjudged by the Court hearing the petition to be hopelessly insane, or is imprisoned in any penal institution in this commonwealth *or of the United States or any other state or territory thereof* under sentence for a term of which more than three years remain unexpired at the date of the petition; or if he has wilfully deserted or neglected to provide proper care and maintenance for such child for one year last preceding the date of the petition *or if the lawful parents of the child have been divorced or separated by judicial decree and the sole custody of the child awarded by judicial decree of a court of this or any other state or territory of the United States to one of the parents or some other person without an order of support by the other parent and if such decree is still in force and such other parent has wilfully neglected to contribute voluntarily a proper amount for the care and maintenance of the child for one year immediately preceding the date of the filing of the petition;* or if he has suffered such child to be supported for more than one year continuously prior to the petition by an incorporated charitable institution or by a town or by the commonwealth; or if he has been sentenced to imprisonment for drunkenness upon a third conviction within one year and neglects to provide proper care and maintenance for such child; or if such person has been convicted of being a common night walker or a lewd, wanton and lascivious person, and neglects to provide proper care and maintenance for such child. A giving up in writing of a child, for the purpose of adoption, to an incorporated charitable institution or the department of public welfare shall operate as a consent to any adoption subsequently approved by such institution or said department. Notice of the petition shall be given to the department of public welfare, if the child is supported by a town or by the commonwealth, and if the child is supported by a town, notice shall also be given to the board of public welfare thereof, and in Boston, said notice shall be given both to the overseers of the public welfare in the city of Boston and to the institutions department."

ASSESSED VALUATION AS EVIDENCE IN LAND DAMAGE CASES

General Laws, chapter 79, section 35 now provides

"Evidence of Assessed Value of Land Taken or Injured"—

"The valuation made by the assessors of a town for the purposes of taxation for the three years next preceding the date of the taking of or injury to real estate by the commonwealth or by a county, city, town or district under authority of law may, in proceedings, brought under section fourteen to recover the damages to such real estate, the whole or part of which is so taken or injured, be introduced as evidence of the fair market value of the real estate

by any party to the suit; provided, however, that if the valuation of any one year is so introduced, the valuations of all three years shall be introduced in evidence. (1913, 401, s. 1, 2; 1915, 281; 1918, 257, s. 187, subs. 35; 1919, 5; 297; 1920, 2.)"

This statute was passed in 1913, at a time when real estate values moved in a closer range than they have in recent years. Purchasers and mortgage lenders at that time regarded the assessed value as a material factor in the price to be paid and the amount to be lent. For some years the assessed value has not been used as a factor in purchases and mortgage loans. There were 6,754 cases from all over Massachusetts pending before the Appellate Tax Board (appeals from assessments), the reason for appeal being over-valuation in most cases (June 30, 1949). In view of the great confusion which exists in our system of local taxation the value of the assessment does not seem to be entitled to the weight which courts and juries may give it. Sales of comparable real estate in the locality freely and fairly made, should be entitled to stand unaffected by this statute; *Epstein vs. Boston Housing Authority,* 317 Mass. 297, presents the picture fully. The valuation made by the town assessors for the three years preceding the taking by eminent domain may be introduced as evidence of "fair market value" by any party under the Statute above quoted, but not in a taking by a public utility or by the Federal government.

I. Background

The tax assessors, while charged with the duty to assess at "fair cash valuation", almost invariably attempt to distribute the tax burden; and thus over and under-assessments are the rule rather than the exception. While the problem of assessment for tax purposes is to raise specified amounts and incidentally to spread the burden equally and proportionately and thus assess only a percentage of real value, the problem of the court in a case of land damage is to find the fair market value of the land. When a legislature provides that assessed valuation shall be the *sole criterion of land damage,* the law may run afoul of the Fifth and Fourteenth Amendments, See *Monongahela Nav. Co. vs. U.S.,* 148 U. S. 312, *County Court of St. Louis, County vs. Griswald,* 58 Mo. 175. Massachusetts has not prescribed that the assessment shall be the sole criterion; and the question remains as to how much weight should be given to evidence of assessed valuation, if any. The majority of other courts have held generally (without statutory provisions to the contrary) that assessed valuations are inadmissible as evidence of market value in condemnation cases.

The courts have based their decisions on different theories.

1. Res inter alios acta—or mere collateral determinations not in any way binding on the parties to the suit—are all that assessments can be.

2. Ex parte—or hearsay evidence—The statements of the assessors may be wholly wrong and self-serving.

3. The owner may acquiesce for tax purposes in his own interest, but this cannot be an admission by him of value in a land damage case.

4. The purpose for which the assessed value was determined is dissimilar.

5. Abnormal economic conditions are, or were, either in favor of, or against, the assessed owner's in so far as the tax levy is concerned. Some other states have statutes like the one in Massachusetts, Pennsylvania allows use of assessed value only at the instance of the party claiming damages; West Virginia is similar to Massachusetts, England allows introduction of assessed valuation. In New York City assessed values can be used to determine fair market value. Apart from statute, such evidence is not admissible to show fair market value. Where such evidence is admitted, it is made admissible by statute on the theory that in a condemnation proceeding all the evidence available should be brought to the attention of the court to assist in its determination, even if the assessed value is not considered as independent evidence. Before the passage of c. 79, s. 35, as it now stands, such evidence was inadmissible in Massachusetts. See *Nichols on Land Damages,* 1907, page 247; *Brown vs. Prov., Warren and Bristol R.R. Co.,* 5 Gray 35 (1855). It does not now apply to all takings but only to those specified.

II. Decisions in Other States

Dubensky Realty Co. vs. Lortz, 129 F. 2d 669 (1942);

Assessors valuation in Missouri is not competent evidence of value where the question of value is the subject of Litigation.

Atlantic Towing Co. vs. The Cahche, 47F Supp. 610 (1943);

In determining value the party offered tax returns, but the court took judicial notice that undervaluation was common and deemed the tax returns to be of little aid.

Everts vs. Matteson, 157 P. 2d 651 (1945);

Where the tax assessor stated he had no opinion as to the reasonable market value, his assessment records were held not to be evidence of fair market value.

Bankers Trust & Co. vs. Int. Trust, 113 P. 2d 656 (1941);

Colorado court held assessed value was not evidence of value other than for tax purposes.

Stubblefield vs. Farmer, 291 Ky. 795 (1942);

Tax values of realty furnish but slight evidence of market values.

In re Shelmires Est., 56 Mont. 26 (Pa.) (1940);

The assessed value of real estate is of little guidance in determining its value because it is well known that assessments are based largely on the necessities of taxing authorities rather than on real value.

Emerson vs. U. S., 76 Ct. Cl. 613 (1934);

The proven assessed value of property cannot, in the absence of proof of such fact be accepted as its actual value.

In Vineyard Grove Co. vs. Oak Bluffs, 265 Mass. 270:

The assessed value is not an admission of value which can be used against the party assessed even if he enters it on a certificate of condition filed with the Commission of Corporation and Taxation.

The controlling Massachusetts Decisions allow such evidence only under the Statute.

Amory vs. Commonwealth, 321 *Mass.* 240 *at* 258, the court said.

"There was no error in the admission of the assessors' valuation. Such evidence is competent by virtue of G.L. (Ter. Ed.) c. 79 s. 35."

Epstein vs. Boston Housing Authority, 317 Mass. 297; Evidence of assessed value was introduced and admitted—C.79 s.35; e.g.

1. Assessed value—$7,000.00

2. Value by expert witnesses—$5,900.00 to $11,500.00

3. Jury valuation—$6,720.00 (including interest)

4. Value by Evidence of Similar Sales—$5,900.00—but this was a foreclosure.

III. Discussion

One of the questions which always arises over "assessed value" is whether or not, in the instant case, the tax rate is high and the assessment is low or, in the alternative, the tax rate may be low and the assessment may be at almost full value.

The jurors who listen to the evidence invariably draw upon their own knowledge in such cases and it may well be that the assess-

ment in question is based on an entirely different scheme than the one to which they are accustomed.

It would be impossible and utterly absurd to go into this question before the jury.

There are other assessing practices which are peculiar to localities and individual assessors. The jury may not know these facts and evidence tending to bring them to light is probably inadmissible. If the assessment figure is used at all, what is its probative value? The answer, viewed in the light most beneficial to those who might advocate the present statute, is—little or none. The assessment figure might have weight if it were shown that such figure was "the fair cash value". This is almost never done and it is improper to make a judgment on a final fact where the subsidiary facts are dubious and wholly unproved. Another answer is that the court should instruct the jury what weight may be given to this evidence, but this presupposes that the court is fully informed. It is entirely possible that the city might under-assess for three years with the aim of taking the property at a lower figure. The statute, as it now stands, does not aid either party to the land damage litigation in any material way and it has constantly beclouded the issue. As we have already pointed out, it does not apply to all public takings but only to some.

We recommend the following

DRAFT ACT

Section 35 of Chapter 79 of the General Laws is hereby repealed.

"Chip" Attachments

In the second report of the Council (reprinted in 12 M.L.Q. No. 2 for Dec. 1926) p.43, attention was called to the practice of making fictitious attachments of the property of a defendant. As there stated,

> "the reason the practice grew up was that since the form of writ of summons and attachment (in common use) ordered the sheriff to attach first and summon afterwards, and the sheriff could not change the form of the writ, but was expected to obey its command and get the summons served . . . he had to do something if he found no property to attach, or was not ordered by the plaintiff's lawyer to make an actual attachment. Accordingly, somebody invented the convenient fiction of 'attaching a chip as the property of the defendant' and then serving the defendant with the summons, which contains the statement to the defendant over the clerk's signature: 'Your goods or estate have been attached to the value of .' (See Peabody v. Hamilton, 106 Mass.

217; Colby's Practice, published in 1848, 109; Howe's Practice, published in 1834, 61)."

As the form of summons thus served contained the official statement (not true in fact) over the name of the chief justice or judge of the court, that property had been attached the Council recommended that this fiction be abolished in connection with a revised form of summons. Subsequently in 1935 the Supreme Judicial Court by rule revised the form of summons and ordered that a note should be added to the summons that "If no actual attachment is directed to be made the statement that goods and property have been attached should be crossed out". (See 292 Mass. pp. 593-595, and 11th report of Judicial Council, 21 M.L.Q. No. 1, Jan. 1936, p. 21).

In the "Bar Bulletin" for January 1950 (p. 12) it is explained that this attempt to stop "chip" attachments did not succeed for the following reason:

"G.L., c.262, s.8, which governs the fees of sheriffs and constables for the service of civil process, provides that fees shall be

" 'For each copy of a . . . superior . . . court writ . . . one dollar;

'For each copy of a district court writ . . . fifty cents'.

"The statute governing service of process provides that where there is an attachment, service on the defendant shall be made by delivering to him a separate summons. An early case held that a chip attachment followed by service of a separate summons is a valid service of a writ of attachment and summons. The statute provides for no fee to the sheriff for making the separate summons which he serves upon the defendant when an attachment is made. The separate summons is supplied by the plaintiff. No fee is charged for a chip attachment, which involves the use of a rubber stamp.

"On the other hand, an 'original summons' without an attachment must be served by delivering an attested copy. A charge of one dollar is made for an attested copy of the original writ where such a writ of summons (without attachment) is used. Rubber stamp fictitious chip attachments continue, because it would cost plaintiffs an additional dollar for service of the process to abolish the fiction.

"No one will be harmed by a statutory amendment which will provide for the service of a separate summons in all cases, as it now is when an attachment is ordered. The fiction of chip attachments will then end."

We think the change should be made as we do not think it helps public confidence in the courts to continue the practice of requiring by law official misstatements to litigants.

We recommend the following:

DRAFT ACT

Section 1.

Section 17 of chapter 223 of the Gen. Laws is hereby amended by striking out the section and substituting the following

Section 17. A separate summons shall be served on the defendant after an attachment on the writ or when no attachment is made at any time after the receipt by the officer of an original summons and the service thereof shall, in either case, be a sufficient service of the original writ.

Section 2.

Section 29 of said chapter is hereby amended by striking out the same and substituting the following

Section 29. A separate summons as provided in Section 17 shall be served by delivering it to the defendant or by leaving it for him as hereinafter provided.

Section 3.

Section 30 of said chapter is hereby amended by striking out the same and substituting the following

Section 30. The separate summons may be served at any time after the attachment has been made, or, if no attachment is made, at any time after the receipt by the officer of the original writ, if, in either case, it is served the number of days before the return day required for the service of the original writ, and a certificate of the service of the summons and of the date of the receipt by the officer of the original writ shall be endorsed on the original writ.

H. 810—Relative to Waiver of Wills.

This bill, referred to the Council by Resolves chapter 4, with a request for a report on the subject matter reads as follows:

An Act relative to the waiver of wills and effect thereof.

Section 15 of chapter 191 of the General Laws, as appearing in the Tercentenary Edition thereof, is hereby amended by striking out the same and inserting in place thereof, the following:—

Section 15. Right to Waive Will. Effect of Waiver.—The surviving husband or wife of a deceased person, except as provided in section thirty-five or thirty-six of chapter two hundred and nine, within six months after the probate of the will of such deceased, may file in the registry of probate a writing signed by him or by her, waiving any provisions that may have been made in it for him or for her, or claiming such portion of the estate of the deceased as he or she would have taken if the deceased had died intestate, and he or she shall thereupon take the same portion of the property of the deceased, real and personal, that he or she would have taken if the deceased had died intestate. If, after probate of such will, legal proceedings have

been instituted wherein its validity or effect is drawn in question, the probate court may, within six months, on petition and after such notice as it orders, extend the time for filing the aforesaid claim and waiver until the expiration of six months from the termination of such proceedings.

The bill copies the exact words of the present section 15 except that it omits the following provision which appears between the words "intestate" and "if" in the 10th line,

OMISSION PROPOSED BY THE BILL.

"except that if he or she would thus take real and personal property to an amount exceeding ten thousand dollars in value, he or she shall receive in addition to that amount only the income during his or her life of the excess of his or her share of such estate above that amount, the personal property to be held in trust and the real property vested in him or her for life, from the death of the deceased; and except that if the deceased leaves no kindred, he or she upon such waiver shall take the interest he or she would have taken if the deceased had died leaving kindred but no issue. If the real and personal property of the deceased which the surviving husband or widow taken under the foregoing provisions exceeds ten thousand dollars in value, the ten thousand dollars above given absolutely shall be paid out of that part of the personal property in which the husband or widow is interested; and if such part is insufficient the deficiency shall, upon the petition of any person interested, be paid from the sale or mortgage in fee, in the manner provided for the payment of debts or legacies, of that part of the real property in which he or she is interested. Such sale or mortgage may be made either before or after such part is set off from the other real property of the deceased for the life of the husband or widow."

While the bill would simplify to some extent, the work of the Probate Courts in administering estates when a will is waived by a surviving husband or wife, we do not recommend it as the present policy has been gradually developed by carefully worded statutes since 1783, and especially since 1854, in regard to the rights of a surviving husband or wife.

The first statutory provision as to waiver of will appeared in section 8 of chapter 24 of the acts of 1783 as follows (the section relating also to the shares of omitted children),

"also the widow in all cases may waive the provision made for her in the will of her deceased husband, and claim her dower and have the same assigned to her, in the same manner as though her husband had died intestate, in which case she *shall receive no benefit from such provision unless it appears by the will plainly the husband's intention to be in addition to her dower.*"

The substance of this was provided in section 11 of chapter 60 of the Revised Statutes of 1836 (Commissioner's note to s. 11).

By chapter 428 of 1854, the wife, on waiver, was given the same share of *both real and personal* estate as on intestacy, provided that she *"shall not, in any case", be entitled to more than $10,000 out of the personal* estate. By s. 1 of chap. 164 of 1861, she was given, also, a life interest in the excess above $10,000 and provision was made for appointment of a trustee for her during her life. These statutes were all for the protection of the surviving wife. By later statutes, noted in the margin of section 15 in the Tercentenary Edition of the General Laws, the right of a husband to waive his wife's will was provided for and the other details worked out which appear in the provision which would be repealed by the proposed bill, H. 810. The detailed operation of that provision is explained in the "Remarks" of Judge Alger in Fuller's "Probate Law", 4th ed., pp. 128-129 and Newhall's "Settlement of Estates" 3rd ed. chap. XIX and XX.

Judging from the wording of the statutes referred to, the purpose of the gradually developing policy has been to protect the right of a husband or wife, who knows the members of the family, to control the disposition of his or her property in the light of his or her knowledge and in accordance with his or her wishes except so far as public policy steps in to prevent dependency of the survivor on the public or others.

The intentions of a person as expressed in his will have always been given primary consideration in Massachusetts both in the statutes and in the decisions of courts and this was apparent in the first statute of 1783, already quoted. It is also apparent in the Massachusetts law (mentioned in the same statute of 1783) and now provided for in section 20 of chapter 191 that children or their issue omitted from a will take the shares they would have in case of intestacy "unless it appears that the omission was intentional."

The limitation of the wife's right in the personal estate to $10,000 in 1854 later changed by the addition of a life interest in the excess above that amount seems to show the same intention to respect the testator's intention subject to reasonable protection to the wife. In case of intestacy the wife or husband is a statutory "heir" and if there are no surviving issue but surviving kindred she will take one-half of whatever there is. So where there is a will which he or she does not like and waives it, he or she will take that amount limited to $10,000 and a life interest in the excess and the will will govern the rest reduced by that amount as limited.

This has been the legislative policy gradually developed since 1854 and we see no reason why it should be reversed.

There would appear to be a variety of reasons today for the continuance of the policy, such as the fact that the survivor may have ample independent property, or may be separated because of his or her fault, or may be disreputable, or alienated for some reason or other, or may be, apparently, but not legally, divorced under the varied and confusing divorce laws of different states, or other reasons known to the deceased when he made his will.

We have explained in detail the history and purpose of the clauses which would be repealed by H. 810, as, otherwise, they would not be apparent from the somewhat technical wording of the present statute.

We do not recommend the bill.

House 1241 Relative to Apportionment of Damages due to Contributory Negligence.

By Resolves chapter 5 a report was requested on "The Subject Matter" of H. 1241 which reads:

> "Chapter 231 of the General Laws is hereby amended by adding at the end of section 85 thereof the following new sentence:—Contributory negligence shall not bar a recovery, but the damages shall be diminished in proportion to the amount of negligence due to such person."

We do not recommend this bill.

The bill would directly affect the trial of almost every accident case in the courts (of which the greatest number are motor vehicle cases) as it would change the common law rule that one who contributes by his negligence to his own damage cannot recover. In a memorandum in support of the bill submitted to the Council by the petitioner, the proposal appears to be based mainly on the provisions of the Federal Employers' Liability Act and the Federal Jones, or Seaman's Act of 1920, which gives a seaman a right of action at common law and incorporates the Federal Employers' Liability Act. (as to Railroads) Title 45 U.S. Code, Sections 51 et seq.

Section 53 of that Act reads as follows:

> *Contributory negligence; diminution of damages.*
>
> "In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery; but the damages shall be

diminished by the jury in proportion to the amount of negligence attributable to such employee; *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

See also Robinson on Admiralty, p. 313. For the Jones, or Seaman's, Act see U.S. Code, Title 46 (Shipping) Sec. 688.

These acts relate only to employees and have the special reason in their relation to a business like that of the state workmen's compensation acts which carry the idea to the point of fixed compensation regardless of the fault of the injured employee.

The bill proposed (H. 1241) would apply to all accident cases in which the injured person was at fault. We are aware of the fact that comparative negligence acts have been adopted in varying broad, or narrow, forms in Mississippi, Nebraska, Georgia, Wisconsin, South Dakota and several Canadian provinces and in England, by the contributory negligence act, 1945, 8 and 9 Geo. VI, c. 28.

These subjects are discussed at length in Gregory's "Legislative Loss Distribution in Negligence Cases" published in 1936, "A Study of Comparative Negligence" 17 Cornell Law Quarterly (1932) by Mole and Wilson; by Prof. Cowan in the Kansas Judicial Council Bulletin for October 1946, Pt. 3, pp. 127-132, and by Prof. Neef in the Michigan State Bar Journal for May 1948, pp. 34-38.

We are also aware that in some states the common law rule has been judicially complicated by subsidiary rules *not applicable in Massachusetts* (see *Beebe v. Randall*, 304 Mass. 207 at p. 211) known as "ultimate negligence" and "The last clear chance". We appreciate the arguments from a theoretical point of view of abstract justice of the idea of distribution of loss.

In our opinion, however, the practical difficulties in obtaining the result outweigh the appealing considerations submitted to us in support of the proposed bill.

In cases in which there is conflicting testimony, tried a year or two after an accident, just how can a jury divide the negligence up into fractions of "abstract justice"? It may be that in the course of time the doctrine of distribution of loss including "comparative negligence" may gradually gain ground and stand the test of experience in other jurisdictions, and practical methods of administering it fairly may emerge, but we do not think the time has arrived to embark on the experiment in Massachusetts. To pass a statute

directing the trial judge to tell them to figure out the relative percentage of mutual negligence would, in our opinion, complicate the law, greatly increase law suits, clog the already overloaded dockets, increase the delay in trials and increase the insurance cost and the insurance rates for all motorists in the commonwealth, without increasing the "abstract justice" obtainable in Massachusetts.

For these reasons we do not recommend legislation on this subject.

House 1306 Relative to Discharge of Mortgages

This bill was referred to the Council by Resolves chapter 13 with a request for a report on "the subject matter".

The bill would amend section 54 of chapter 18 of the General Laws, relating to the discharge of mortgages, which now provides for a discharge on the margin of the record and then continues,

> "One of two or more joint holders of a mortgage may so discharge it or he may discharge it by a deed of release duly acknowledged and recorded. A mortgage may also be discharged by a written acknowledgment of payment or satisfaction of the debt thereby secured, or of the conditions therein contained, signed and sealed by the mortgagee, his executor, administrator, successor or assignee. Such instrument shall have the same effect as a deed of release, shall be valid if executed by one of two or more joint holders of a mortgage and may be recorded when duly acknowledged or on proof of its execution in accordance with sections thirty-four to forty-one inclusive."

The proposed bill would add at the end of the section the following sentence:

> "If a husband and wife are holders of a mortgage, either one of them may discharge the mortgage as herein provided and such discharge shall have the same effect as if they were sole."

We do not recommend this bill.

The purpose of the bill is to change the law as stated in *Pineo v. White,* 320 Mass. 487. We are informed that prior to that opinion many conveyancers considered that section 54 as above quoted authorized a discharge by a wife of a mortgage held by both if the mortgage note was given up and that, because of that view, since the opinion referred to, titles are clouded where both did not sign the discharge.

In *Pineo v. White* the court said that a discharge by the wife alone was "not sufficient to release and discharge the mortgage" because a conveyance to husband and wife as joint tenants at common law "created a tenancy by the entirety", a special kind of title based on the marital relations, and that the statutory provision for

discharge by one or more joint holders" did not apply to holders "by the entirety".

The bill presents a question of policy having various aspects and while we appreciate the conveyancing problem involved which bears on the title questions before the Land Court or other courts, we think that the policy of protecting the marital relation and its incidents in the same manner as it is protected by the rights of dower and curtesy, outweighs the conveyancing difficulty and, therefore, we do not recommend the bill.

H. 1709 Relative to Foreclosure of Tax Titles

This bill was referred, with a request for a report on the "subject matter", by Resolves Chapter 6. The bill is printed in full in the footnote.*

A statement in support has been submitted to us by the petitioner. There is a difference of opinion among conveyancers as to the need of legislation. The petitioner in his statement says:

"From the point of view of the public, which would like to buy them, and the conveyancers who have to pass on them, foreclosing tax titles in Massachusetts have but two major weaknesses. The first has to do with the description of the property concerned and it may be dismissed by saying that it is seldom now-a-days that such description is so indefinite, ambiguous, uncertain, or insufficient as to invalidate the tax title in question.

"The real reason why most conveyancers shy away from foreclosed tax titles is because the procedure is not conclusive enough to assure them that

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HOUSE 1709

AN ACT RELATIVE TO RESPONDENTS IN ACTIONS TO FORECLOSE TAX TITLES AND PROVIDING THAT SUCH ACTIONS SHALL BE ACTIONS IN REM.

Section 66 of chapter 60 of the General Laws, as most recently amended, is hereby amended by adding at the end thereof the following four new paragraphs:—

If the court orders that such notice be given by publication, such notice shall be published under the supervision of the recorder of the court by printing such notice once in a newspaper published in the town, if any, otherwise in the county, where the land lies, twenty days at least before the return day of said notice. The certificate of the recorder that notice has been published as ordered shall be filed in the case on or before the return day, and shall be conclusive proof of such publication. If notice has been so published, by the description in the notice "to all whom it may concern", all the world shall be made parties defendant, whether mentioned by name in the petition, notice or citation.

If, after notice has been given as herein provided and the time limited in such notice for the appearance of the respondents has expired, the court finds that there are or may be respondents not actually given notice within the commonwealth who have not appeared, or who are minors, or persons under disability, or unascertained, unknown or out of the commonwealth, it may of its own motion, or on the representation of any party, appoint a disinterested person to act as guardian ad litem for any such respondents. The compensation of the guardian ad litem shall be determined by the court and paid by the petitioner.

After all the respondents have been given notice as hereinbefore provided, and after the appointment of a guardian ad litem, if the court has found such appointment necessary, the court may proceed as though all respondents had actually been notified.

Such petition shall be a proceeding in rem against the land, and any decree entered as provided in section sixty-nine shall operate directly on the land and have the force of a release made by or on behalf of all respondents of all claims adverse to the petitioner's title.

all possible persons are precluded by the decree. The result is that it is deemed necessary to remedy the defect by resorting to one procedure of the Land Court to perfect another. In other words, before the holder of a foreclosed tax title can sell or mortgage the property in question, he finds it necessary to register his title at great expense of time and money. And the resort to registration of the title is not usually to set the bounds but merely to cut off all possible adverse claims, because the land registration procedure is an action *in rem*.

"The chief objective of the bill is to make the procedure under chapter sixty section 64 et seq. an action in rem so that a decree thereunder will beyond doubt preclude all possible adverse claimants. It has been loosely said that the present procedure under said section 64 et seq. is in rem but that is not so either in effect or by interpretation. That language of the statute is in per sonam. The most that could be said would be that it sounds like an action which is "quasi in rem". But "quasi in rem" is not in rem at all and carries with it none of the conclusive benefits or advantages of an action "in rem."

"Some have said that by force of chapter sixty section 69A, there is sort of a Statute of limitations erected as a barrier against any and all adverse claimants after one year after the date of the decree. In that connection, the writer would like to say that although he was instrumental in the passage of the law which created said Section 69A said section was merely the tail end of a bill similar to House Bill No. 1709 now in question, and that he has never been satisfied that as a constitutional matter said section 69A ever cut off non-residents of Massachusetts and maybe some others who may not have received at least constructive notice. And, it can be definitely stated that the rank and file of the Conveyancing Bar will never be satisfied with the procedure in question until it has been made *in rem*."

On the other hand a conveyancer of long experience in dealing with tax title foreclosures for the City of Boston writes us:

"As the law now stands, many conveyancers rely upon these proceedings and pass titles thus acquired. There are some remaining who decline to do so, the reason probably being historical and dating back to tax titles acquired under the law as it existed prior to July 1, 1915, when many, perhaps most, tax titles were vulnerable.

"The City of Boston has had little, or no, difficulty in disposing of titles acquired by foreclosure of tax titles. The added cost of foreclosure if the Bill under consideration becomes law, and is followed, would be approximately $50 per case. This would seem to be an unnecessary expense to the municipalities in most cases. The words 'in rem' are a sort of 'sesame' inviting some conveyancers to enter where they would otherwise fear to tread.

Merchantability of title to land—the basic asset of the Commonwealth—is, of course, of great public importance and, as many landowners know, merchantability depends largely on the opinions of conveyancers who examine the titles. Doubtful opinions even if

unfounded, if sufficiently common, have serious consequences, but we should consider the nature of the doubts.

We believe the doubt of the constitutional effectiveness of the present foreclosure procedure in Chap. 60 to be unfounded. It appears to revolve about the ancient Latin phrases *"in rem"* and *"in personam"*, borrowed from the Roman law and utterly imcomprehensible to laymen and not always clear to lawyers. The petitioner in support of his bill relies on the opinion of Chief Justice Holmes in *Tyler v. Court of Land Registration,* 175 Mass. 71, but in that opinion, the Chief Justice said (at p. 76), "It is certain that no phrase has been more misused."

Our system of foreclosing tax-titles originated with the report of the Special Commission "To consider and recommend changes in the laws relative to Liens, Mortgages and Tax Titles" appointed under Resolves of 1914 Chapter 121 (House Document No. 1600 of 1915). The members of that Commission were Hon. Charles T. Davis, a judge of the Land Court, Francis M. Phelan and Samuel W. Child.

In the report (p. 18) the Commission said "at present [1914] the tax title is in practice merely a basis for trading or litigation. It is to the interest of the municipal authorities, landowners and the tax-title buyers that the title should be one under which the rights of all are definite, redemption 'made simple, and, failing of redemption', one that can be foreclosed *so as to afford a marketable title to the land thereafter."* (Italics supplied.) The act drafted by the Commissioners appears on pp. 31-38 of the report and to carry out the purpose recommended, as above quoted, contained, in Sections 1 and 2, the provision that the title under a sale or taking "Shall until redemption *'or until the right of redemption' is foreclosed as hereinafter provided, be held as security."* This provision appears in Sections 1 and 2 of Chapter 231 of the Acts of 1915 following the Commission's report and now appears in Sections 45 and 54 of Chapter 60 of the General Laws.

As we see it, following up these provisions, the obvious purpose of the statutes passed since 1915 has been to make it constantly clearer that the foreclosure of the tax lien on the land to secure the municipality is intended to be one to "bind the land" by providing first for an opportunity to appear and contest the tax or the foreclosure or to redeem and second a limitation of time for those opportunities. Binding the land, or quieting the title, is the substantial idea regardless of Latin words.

Accordingly section 64 of chapter 60 (adopted in 1915) provides that

> "The title conveyed by a tax collector's deed or by a taking of land for taxes *shall be absolute after foreclosure* of the right of redemption by decree of the land court as provided in this Chapter."

Sections 65 and 66 provide for a petition and what shall be done about it including a notice by registered mail to persons interested as shown by a report of a title examiner's report,

> "The notice, to be addressed *'To all to whom it may concern,'* shall contain the name of the petitioner, the names of all known respondents, a description of the land and a statement of the nature of the petition, shall fix the time within which appearance may be entered and answer filed, and shall contain a statement that unless the party notified shall appear and answer within the time fixed a default will be recorded, the petition taken as confessed, and the right of redemption forever barred."

> Section 67. "DEFAULT.—After the return day fixed, to be at least twenty days after the time of the actual issuance of notice, the court shall, if satisfied that the notice has been properly given, on motion of the petitioner enter an order defaulting all persons failing to appear and answer, and decreeing that the petition as to them be taken as confessed."

> Section 69. "DECREE BARRING REDEMPTION, WHEN.—If a default is entered under section sixty-seven, or if redemption is not made within the time and upon the terms fixed by the court under the preceding section, or if at the time fixed for the hearing the person claiming the right to redeem does not appear to urge his claim, or if upon hearing the court determines that the facts shown do not entitle him to redeem, a decree shall be entered *which shall forever bar all rights of redemption.*"

The limitation on any form of "petition to vacate" or any form of "proceeding at law or in equity for reversing or modifying" a foreclosure decree in Sec. 69A above quoted, merely supplements and emphasizes the previous unqualified intent of sections 64 that "the title . . . shall be absolute after foreclosure of the right of redemption" and of Section 69 that "a decree shall be entered which shall forever bar all rights of redemption." The English language provides no stronger words.

The constitutional doubts expressed by the petitioner as to the effect of these statutes in cutting off non-resident claimants seem to be fully answered by both the Supreme Court of the United States and the Massachusetts court.

The case of Tyler v. The Court of Land Registration, referred to by the petitioner in the passage quoted established the validity of our land registration system which has now been in operation

for fifty-two years. The opinion was written by Chief Justice Holmes followed a few years later by the unanimous opinion of the Supreme Court of the United States (after he had become a member of that court) in Leigh v. Green, 193 U. S. 79. In that case, relying on, and quoting from, the Tyler case, the court said, in regard to a Nebraska tax foreclosure statute, (at pp. 92-93),

> "The principles applicable which may be deduced from the authorities we think lead to this result: Where the State seeks directly or by authorization to others to sell land for taxes upon proceedings to enforce a lien for the payment thereof, it may proceed directly against the land within the jurisdiction of the court, and a notice which permits all interested, who are 'so minded,' to ascertain that it is to be subjected to sale to answer for taxes, and to appear and be heard, whether to be found within the jurisdiction or not, is due process of law within the Fourteenth Amendment to the Constitution.
>
> "In the case under consideration the notice was sufficiently clear as to the lands to be sold; the lienholders investigating the title could readily have seen in the public records that the taxes were unpaid and a lien outstanding, which, after two years, might be foreclosed, and the lands sold and by the laws of the State an indefeasible title given to the purchaser. Such lienholder had the right for two years to redeem, or, had he appeared in the foreclosure case, to set up his rights in the land. These proceedings arise in aid of the right and power of the State to collect the public revenue, and did not, in our opinion, abridge the right of the lienholder to the protection guaranteed by the Constitution against the taking of property without due process of law.
>
> "The judgment of the Supreme Court of Nebraska is Affirmed."

The Nebraska statute did not contain the words 'in rem" but the court, specifically and repeatedly, described the proceeding before it as "in rem" although these words were not used. See pp. 86, 90, 91, quoting Freeman on Judgments, and 92 (quoting Holmes, C. J. in the Tyler case). See also Ballard v. Hunter 204 U. S. 241, and the opinion of Mr. Justice Moody in Longyear v. Toolan, 209 U. S. 414 at p. 418. For Massachusetts tax foreclosure cases see Napier v. Springfield, 304 Mass. 174, in 1939 (citing Leigh v. Green) prior to chapter 302 of 1946 which inserted the words "in rem" in the revised section 80B of chap. 60 relating to "low value" lands; and Lowell v. Marden & Murphy, Inc. 321 Mass. 597 in which a Land Court decree of foreclosure of a tax taking was sustained after discussion of details of the tax collection procedure which was challenged. Certiorari was refused by the Supreme Court of the United States for lack of a "substantial federal question" in 332 U. S. 850. As shown by the cases cited, and especially by the case of Leigh v. Green, the paramount authority of the state to collect taxes on land within its borders by a reasonable and not too expensive procedure which identifies the land is

the basis of the statutes. The state is not obliged to provide for expensive plans for establishing exact boundaries of the land assessed and taken or sold.

In Town of Agawam v. Connors 159 Fed. 2nd 360 (1957) the Circuit Court of Appeals for the First Circuit said of our procedure (at p. 364).

"It can hardly be doubted that the Land Court proceedings were essentially in rem. By commencement of foreclosure proceedings and the filing of the statutory notices the state court had acquired constructive possession and jurisdiction of the property."

Certiorari was denied by the Supreme Court of the United States 330 U. S. 845.

Publication and posting before a tax sale is required by sections 40 and 43 of chapter 60 of the Gen. Laws. Tax sales, which were formerly common have been commonly discontinued in favor of tax takings and "posting" in two "public places" is required, in addition to other notices as to takings, by section 53 as amended by section 3 of chapter 164 of 1933. (See Lowell v. Marden & Murphy Inc. above cited.) These requirements are sufficient under the cases cited. It usually takes about 4 years or more before all rights of redemption are finally barred.

Assuming, therefore, a description which identifies the land we believe the present statutory procedure for foreclosing a tax title sufficient to justify conveyancers and their clients in relying on them for a good invulnerable title as a matter of law.

This does not mean that such a title would stand under rare and peculiar circumstances if proved such as those in Saftel v. Brooks, 254 Mass. 516 where the holder of the equity tried to get rid of a mortgage by failing to pay taxes and then buying in the tax title and claiming it as paramount to the mortgage (see p. 519). Such a case may involve a breach of condition of the mortgage warranting proceedings to foreclose the mortgage in equity to which the tax title foreclosure decree might be no defense because of fraud or estoppel, and does not involve the problem we have discussed. Our problem may, perhaps, be best illustrated by assuming a case in which the property has been assessed to "unknown owners" or to the occupant as the statutes allow (see G. L. Ch. 59, s. 11 as amended by St. 1939 chap. 175; and Boston v. Quincy Market Cold Storage Co., 312 Mass. 638 at pp. 642 and 645). In foreclosure proceedings, assume that the title examiner cannot find who, if anyone, besides the occupant, if any, has any

interest in the property under Sec. 66 of Chap. 60. The land may be apparently vacant or the title based on adverse possession, if adequate against unknown or uncertain claimants, and not a title of record. Nevertheless, the city or town is entitled to its taxes and may take and foreclose as provided in the statutes. In such a case there would seem to be no question that the foreclosure decree would give absolute title as provided by statute against any claimant who appeared and who might have appeared earlier, even if not notified.

The decree imports a finding of all subsidiary facts, see Bucher v. Randolph, 307, Mass. 391 (citing Tyler v. Court of Land Registration and Napier v. Springfield, at p. 394).

The fact remains, however, that some and, perhaps, many careful conveyancers do not rely on a foreclosure decree unless they have examined the title, prior to foreclosure, as they would any other title, and are satisfied that all possible claimants of record were notified. They do not rely merely on the report of the Land Court examiner under section 66 of chapter 60 who is directed to make "an examination of the title sufficient *only* to determine the persons who may be interested in the same" so that "all persons *appearing* to be interested" may be notified by registered mail. It has been suggested that, if the Land Court examiner were directed, by statute or rule, to report his opinion as to the marketability of the title in someone, as conveyancers do outside of court, such a requirement might help, and might result in a better price for the property because of such report. This would, doubtless, add to the cost of foreclosure and redemption, but it would be cheaper than registration. Even such a requirement, however, would not convince many conveyancers who frequently disagree with the opinion of other conveyancers. Since, as we have already pointed out, marketability depends ultimately on conveyancing opinion which cannot be controlled by statute, we believe that doubts can only be removed by the gradual development of opinion among conveyancers themselves as to the effectiveness of a foreclosure decree and the safe practice in regard to it. We hope this discussion may help such a gradual development.

We believe we have enough statutes on the subject. If conveyancers are not convinced by existing statutes and judicial decisions, we see no reason why the legislature should increase the steps and the cost of tax collecting, both to the municipalities and persons who wish to redeem, by an ineffectual statute inserting the two Latin words "in rem", which would not add anything and would *not* remove the existing doubts.

We do not recommend H. 1709 or any other legislation on the subject.

A thoughtful, but radical, revision of the whole procedure for tax foreclosures, resembling a taking by eminent domain, has been submitted to us in place of H. 1709 by a lawyer, other than the petitioner, but we do not advise it, or discuss it in detail, for the reasons stated.

H. 1722 Providing for the Enforcement of Decrees for Alimony and Non-support by the Registers of Probate

This bill referred to the Council by Resolves Chapter 8, reads as follows:

> Section 22 of chapter 217 of the General Laws, as appearing in the Tercentenary Edition, is hereby amended by adding at the end the following:—
>
> The registrar shall, when so directed by a judge of probate, receive and disburse moneys payable under a decree of the court for alimony and non-support. He shall make application to the court for such processes as may be necessary to carry into effect such decrees, and shall issue and serve such processes, the cost of such service to be taxed as costs against the party so served. He shall, on request of an interested party, make application to the court for such processes as may be necessary to carry into effect a decree of alimony or non-support, and shall issue and serve such processes, the cost of such service to be taxed as costs against the party so served.

We do not recommend this bill. The register of probate is the clerk of the Probate Court. We do not believe that the clerk of any court should be turned into a collection agency in the manner suggested in this bill for certain specified litigants.

In the district courts where non-support cases appear on the criminal side of the court the payments ordered by the court as a condition of probation are collected in substantial totals by the probation officers. The probate court has no probation officers. The only way to enforce probate court non-support orders is by contempt. The proposed bill would place on the register the functions and responsibility of a lawyer for the petitioner, a sheriff and a probation officer all at once in a proceeding which may lead up to a contempt order. We do not think it is in the public interest to put a clerk of court in such a position.

H. 1727 Relative to Recording Conditional Sales of Personal Property

(Referred by Resolves Chapter 12)

This bill (printed in full in a footnote)* calls for recording of all conditional sales of personal property except that attached to real estate and otherwise described in G.L. chap. 184, s. 13. It was introduced on petition of a used car dealers association for the apparent purpose of requiring the recording of such sales of used cars. It is vigorously opposed. We do not recommend the bill.

So far as cars are concerned, there appears to be no sufficient difficulty in ascertaining the facts of ownership to call for such recording.

So far as the broader aspects of the bill relating to other personal property is concerned, we have received no evidence of conditions which call for such legislation which would add to the already excessive number of papers to be recorded and stored at public expense.

H. 2333—To require Insurance Companies to disclose Motor Vehicle Insurance Coverage in Excess of Required Minimum.

House 2333 was referred to the Council by Resolves chapter 18 with a request for a report on "the subject matter" thereof. The bill reads as follows:

"Chapter 175 of the General Laws is hereby amended by inserting after section 113G the following section:—

"Section *13H. Any company issuing a motor vehicle liability policy, as defined in section thirty-four A of chapter ninety, shall, upon the written request of a person injured as a result of an accident involving a motor vehicle of an assured of such company, or upon the written request of his agent or attorney, furnish to such person, his agent or attorney, under oath,

---

HOUSE 1727

AN ACT TO PROVIDE FOR THE RECORDING OF CONDITIONAL SALES OF ALL PERSONAL PROPERTY NOT COVERED BY GENERAL LAWS.

Chapter 255 of the General Laws is hereby amended by adding the following new section:—

Section 131. All conditional sales of personal property, with the exception of personal property covered by chapter one hundred and eighty-four, section thirteen, of the General Laws, as amended, shall within ten days from the date written in the conditional sale, be recorded on the records of the town where the conditional vendee resides when the conditional sale is made, and on the records of the town where he then principally transacts his business. If the conditional vendee resides out of the commonwealth, and the property covered is within the commonwealth when the conditional sale is made, the conditional sale shall be recorded on the records of the town where the property then is. If a record in two different places is required and the conditional sale is recorded in one within said ten days, it may be recorded in the other within five days after the date of the first record. The conditional sale shall not be valid against a person other than the parties thereto until so recorded, and a record made subsequently to the time limited shall be void.

the amount or limit of indemnification or protection contained in the policy of such assured in excess of the minimum amounts prescribed by said section thirty-four A."

This bill would result in an unwarranted invasion of the private affairs of defendants and their insurance company. A parallel situation would be a bill requiring that every person who is sued in court should be required, at the request of the plaintiff, to disclose his exact financial situation.

The bill seems clearly discriminatory in that it would require insurance companies to divulge information, not only of their private affairs, but those of their customers that would not be required of any one else.

We believe the proposed statute would be against the public interest. For these reasons we do not recommend the bill.

Renewal of Recommendation for Jury Commissioners

In the 23rd report (pp. 33-36) and in the 24th report (pp. 19-26) we recommended the establishment of jury commissioners for the selection of jurors in a district comprising the counties of Norfolk, Middlesex and Suffolk. The reasons for the recommendation were stated in that report and also in the 9th Report of the Judicial Council in 1934, as well as in the report of the so-called "Crime Commission" in 1934 and in the report of a special committee of the bar in 1935. The plan was not adopted.

The long and successful experience with jury commissioners in Ohio and the recommendations of the conference of senior circuit judges for such commissioners for the Federal courts, submitted to Congress, formed a background for this recommendation. Various criticisms of details and cost were received. These can be studied and considered further if, and when, the General Court considers the main proposal worthy of further consideration.

We recommend the further consideration of the latest draft of the act submitted on pages 23-26 of the 24th report (in 1948) in the light of the discussion in that report and of the practical details referred to on pp. 21-23 of that report. The latest discussion of the subject appears in "Minimum Standards of Judicial Administration" edited by the Chief Justice of New Jersey and published for the National Conference of Judicial Councils, (p. 185). It, there, appears that "Jury Commissioners are used to select the names of jurors in all, or, at least, certain areas of thirty-four

jurisdictions" and that "in twenty-four of these, the jury commissioners are appointed by the Courts" (see p. 187).

Quarters and Additional Funds for the Work of the Judicial Council

Last year the 25th report contained recommendations for permanent quarters for the Council in the Suffolk County Court House and an additional appropriation for its work. The Judiciary Committee reported favorably on the matter of quarters but the Committee on Counties reported in the negative and negative action followed. No additional appropriation was made. We renew the recommendations for the following reasons.

The Massachusetts Judicial Council is the oldest active Council in the country. As explained in the 25th report (p. 42) it was created in 1924 on the recommendation of the Judicature Commission, in its second and final report (House 1205 of 1921, pp. 25-28), which was the effective stimulant to the development of the movement resulting in the creation of Judicial Councils, composed of judges and members of the bar, in many states.

The purpose of such Councils is stated in the act on page 4 and in the opening sentence of this report on page 5. In support of that purpose the Judicature Commission said in its report (p. 26),

> "It is not a good business arrangement for the Commonwealth to leave the study of the judicial system and the formulation of suggestions for its development almost entirely to the casual interest and initiative of individuals. The interest of the people, for whose benefit the courts exist, calls for some central clearing house of information and ideas which will focus attention upon the existing system and encourage suggestions for its improvement."

Since its creation in 1924 the Council has made twenty-six annual reports (and a few special reports) containing many recommendations, most of which have been followed. In addition to the discussions by the Council on its own initiative, it has reported, at the request of the legislature, on many bills referred to it. Almost all of these questions have been answered with the reasons and recommendations of the Council with the few exceptions of questions of legislative policy for which the Council was neither created nor equipped. These reports appear to have been of assistance to the legislature as most of them have been followed.

The history of the Council and its work from 1924 to 1938 appears in the 14th report (pp. 43-73) and the consolidated table of contents of the first fifteen reports were printed for convenient

reference in the 15th report (pp. 91-105). For the same purpose we print in Appendix A of this report the table of contents of the last ten reports from 1940 to 1950. A glance at these will show the number and variety of subjects with which the Council is called upon to deal. As stated in the 25th report (p. 44),

> "The study of courts and the operation of judicial systems is constantly increasing throughout the country. In order to do the work for which it was created and answer questions referred to it by the legislature, it is necessary to keep in touch with the studies and the discussions and practice and procedure in other parts of the country which are frequently the basis of bills or other proposals suggested for Massachusetts. No judicial system can remain static in its details and meet the needs of the community. As has been stated in the earlier reports of the council every detail of procedure and practice affects in some way, the lives and interests of more people than is commonly realized and, wise or unwise suggestions of varied character and scope, supposedly for improvement, are constantly made and call for study."

So much by way of introduction.

Quarters

The Council has no quarters:—quarters for working and for the files of twenty-six years have been provided by the secretary. Those files containing materials used in connection with its reports are now scattered either in a storage warehouse at the secretary's expense or in the secretary's house where they are not only a nuisance but are not within reach. For practical purposes the contents of the files and their location, if wanted, exist only in the secretary's head because there is no other place for them. That does not seem a good business arrangement for such a body as the Council either for the present or future. We understand that there is available space in the Suffolk Court House. If the files are to be preserved, and we assume that to be advisable, some convenient place must be provided where they can be gathered and gradually sorted and arranged, so as to be accessible. We, therefore, renew the recommendation for quarters.

Appropriations

The story of appropriations, since 1924, was told in the 25th report, pp. 43-44, and it was explained that the appropriation "for expenses" originally $3,000, was gradually cut down to the present $1,800, established by the Budget Commissioner about twelve years ago and approved by the governor and council annually. The appropriation thus established and maintained has not been exceeded.

As stated in the 25th report (p. 44), "hitherto all the work of the Massachusetts Council has been done by the secretary and the members of the Council (with part time clerical service), "while the New York Council "has quarters, an executive secretary, three research assistants, three stenographic clerks and its average cost has been $29,800 provided by the legislature. In California, where the council is established by the constitution, the appropriations have been very much larger."

In the opinion of the Council it can be of more service if it is better equipped, and with a larger appropriation, to enable it to employ such additional clerical assistance as may be needed to do the work described above more effectively by employing an assistant secretary for such period and on such terms and conditions as the council may direct, to be employed by and removed by the council in its discretion and at a monthly salary rate during the time of his employment of not more than three hundred dollars. We estimate the cost of additional full time clerical assistance at $2,600.00. These two items amounting to $6,200.00 added to the present annual appropriation of $1,800.00 for expenses would make a total for expenses of $8,000.00 in addition to the salary of the secretary as now fixed by statute.

For these reasons, we respectfully suggest an additional appropriation of sixty-two hundred dollars and that provision be made for permanent quarters for the Council in the Suffolk County Court house.

As to the appropriation for clerical service no draft act seems needed, as it is solely a matter of appropriation as an item in the annual appropriation act and the expenditures from the appropriation are subject to the approval of the Governor and Council, under Section 34C of the Council Act.

We submit the following

DRAFT ACT

Section 34C of chapter 221 of the General Laws (see page 4 of this report) is hereby amended by adding at the end thereof the following

"Permanent quarters for the judicial council shall be provided in the Suffolk County Court House. If the council so votes, there shall be an assistant secretary for such periods and on such terms and conditions as the council may direct, to be employed and removed by the council in its discretion, and at a monthly salary rate during the time of his employment of not more than three hundred dollars."

The District Courts

The volume of business of these courts is shown in Appendix B. The business of the Municipal Court of the City of Boston appears in Appendix C, pages 76-78.

We call attention to the circular letters of the Administrative Committee of the District Courts of January 18, and September 8, 1950 which are reprinted, as usual, in Appendix B. Those letters contain a continuous story of the work of that committee and the helpful information distributed semi-annually to the judges, clerks and probation officers of those courts. Practitioners in these courts will do well to examine them.

Frank J. Donahue, *Chairman*

Wilfred J. Paquet, *Vice-Chairman*

Louis S. Cox

John E. Fenton

John C. Leggat

Davis B. Keniston

Frank L. Riley

Frederic J. Muldoon

Reuben L. Lurie

Charles W. Bartlett

APPENDIX A

THE CUMULATIVE TABLE OF CONTENTS OF THE SIXTEENTH TO THE TWENTY-SIXTH REPORTS OF THE JUDICIAL COUNCIL OF MASSACHUSETTS FROM 1940-1950

In Appendix A of the Fourteenth Report of the Judicial Council (pages 43-73), appeared an account of the history of the Judicial Council and the results of its work from 1924 to 1938. To supplement that account, the tables of contents of the first fifteen reports were printed for convenient reference at the end of the 15th report in 1939. We now reprint the tables of contents of the last ten reports from 1940-1950 for convenient reference. They, as well as the appendix to the Fourteenth Report are likely to be found of value to the bench and bar *as a guide to material not found elsewhere, but bearing directly on problems in practice* because they contain references to much statutory history.

The reports of the Council are obtainable at the Public Document Room at the State House. References are given to the number of the *Massachusetts Law Quarterly* in which each report was reprinted so that those who keep the back numbers of the *Quarterly* can find the reports readily.

SIXTEENTH REPORT — 1940

(Reprinted 26 Mass. Law Quart. No. 1, January 1941)

SEVENTEENTH REPORT — 1941

(Reprinted 27 Mass. Law Quart. No. 1, January 1942)

EIGHTEENTH REPORT — 1942

(Reprinted 28 Mass. Law Quart. No. 1, January 1943)

NINETEENTH REPORT — 1943

(Reprinted 29 Mass. Law Quart. No. 1, January 1944)

TWENTIETH REPORT — 1944

(Reprinted 29 Mass. Law Quart. No. 4, December 1944)

TWENTY-FIRST REPORT — 1945

(Reprinted 30 Mass. Law Quart. No. 4, December 1945)

TWENTY-SECOND REPORT — 1946

(Reprinted 32 Mass. Law Quart. No. 1, March 1947)

TWENTY-THIRD REPORT — 1947

(Reprinted 32 Mass. Law Quart. No. 4, December 1947)

TWENTY-FOURTH REPORT — 1948

(Reprinted 33 Mass. Law Quart. No. 5, December 1948)

TWENTY-FIFTH REPORT — 1949

(Reprinted 34 Mass. Law Quart. No. 5, December 1949)

TWENTY-SIXTH REPORT — 1950
(See Cover of This Report)

APPENDIX B

DISTRICT COURTS

There are 72 of these courts in addition to the Municipal Court of the City of Boston, and eight of them, besides that court, are in Suffolk County. Their volume of business appears in the table *opposite*. The history of the discussion of these courts since 1876 appears in the Law Society Journal for February 1945 (also MLQ May 1945, see also list of reports in 20th Report of the Judicial Council, page 29 and pp. 86 and 92 of the 22nd report. For comparison, we have added to the first of the following circular letters, a column of business for the year ending September 30, 1950, from the table opposite this page.

COMMONWEALTH OF MASSACHUSETTS
ADMINISTRATIVE COMMITTEE OF THE DISTRICT COURTS

January 18, 1950

TO THE JUSTICES, CLERKS AND PROBATION OFFICERS OF THE DISTRICT COURTS:

We are sending herewith on separate sheet the statistical compilation of the work of the District Courts for the year ending September 30th, 1949. A five-year comparison is as follows:

	1944 to 1945	1945 to 1946	1946 to 1947	1947 to 1948	1948 to 1949	1949 to 1950
Civil Writs Entered	33,009	38,660	51,616	59,817	58,697	55,702
Contract	15,027	15,356	19,676	24,512	29,737	30,647
Tort	9,668	11,416	13,213	15,443	15,663	14,547
Summary Process (Ejectment)	7,464	11,321	18,007	18,798	12,282	9,715
All Other Cases.....	850	567	579	1,064	1,015	793
Rep. to Appellate Div.....	72	98	87	82	90	96
Appealed to S. J. Court	26	10	8	20	15	19
Supplementary Process.....	11,785	10,990	11,517	13,148	16,423	18,255
Small Claims	28,986	28,950	37,788	48,594	56,166	54,962
Criminal Cases Begun.....	105,936	135,176	168,465	155,452	157,988	155,398
Criminal Appeals	2,609	3,118	3,400	3,150	3,462	3,317
Drunkenness	41,715	48,807	64,244	59,398	56,696	54,679
Op. under Inf. Int. Liquor...	2,665	3,752	4,601	4,079	4,197	4,921
Total Automobile Cases	37,132	55,666	72,923	66,076	68,522	68,352
Int. Iiquor Cases	228	217	170	207	179	182
Juv. Cases under 17 Yrs.	7,458	6,376	5,542	4,701	5,219	4,933
Total Motor Cases Entered...	8,251	9,836	11,398	13,593	13,477	12,456

There was a slight decrease in the number of civil entries from that of the previous year which was more than accounted for by the great drop in the entry of summary process cases (ejectment) which decreased more than 34%. The number of tort cases entered was slightly larger but there was a large increase in contract cases entered which did not, however, quite compensate for the loss of the entries in the summary process cases.

A comparison of the foregoing statistics shows the following changes for the past year:

Civil writs entered decreased from 59,817 to 58,697—of these contract actions increased from 24,512 to 29,737 and tort actions from 15,443 to 15,663. There was a decrease in summary process cases (ejectment) from 18,798 to 12,282 indicating that there has been great improvement in the housing problem. The total number of removals to Superior Court decreased from 4,544 to 4,406 and the removal of tort cases from 3,315 to 3,065 which indicates a decrease in the percentage of removals to the Superior Court. Small claims again made a large increase from 48,594 to 56,166 which is almost double the number of such cases entered than were entered four or five years ago. It will be observed that the number of small claims actions now entered has almost reached the number of total civil writs entered and far exceeds the number of contract and tort actions entered by regular writs. We find that there are a great many trials in the small claims session and that many of such trials consume as much time for the court as many cases heard in the regular civil session. It would appear that the small claims procedure which originally was used to collect small bills over which ordinarily there was no dispute has developed into a medium for full fledged trials of contested actions of small amounts governed, of course, by the informal small claims procedure. It is undoubtedly economical to the litigant and the public and its use should be encouraged. We mention the great increase in these cases and the change in the character of them simply to call attention to the fact that the civil work of each court has been greatly increased with a corresponding increase in the work in the Clerk's offices. Supplementary process cases increased from 13,148 to 16,423 a relatively large increase over entries of previous years which perhaps indicates an unfavorable turn in the economic situation but certainly indicates an increase of work for the judges and clerks in handling this troublesome type of procedure. The number of criminal cases begun (actually the number of defendants in such cases) increased from 155,452 to 157,988 and the appeals in such cases increased from 3,150 to 3,462. The increase in appeals follows in a normal ratio to the increase in the number of entries and still indicates that only 2% of the cases entered are appealed which shows satisfactory disposition of such cases in the District Courts. Automobile cases have increased from 66,076 to 68,522 and operating under the influence of liquor cases have increased from 4,079 to 4,197. The increase in such cases particularly those of operating under the influence of intoxicating liquor is moderate and has undoubtedly been caused by the tremendous use of the highways for motor vehicle traffic during the past year by the greater number of automobiles. Drunkenness cases decreased from 59,398 to 56,696 and releases of such by the probation officers has decreased from 31,328 to 28,932. Intoxicating liquor cases have again decreased from 207 to 179 and inquests have decreased

from 82 to 76. Parking tickets returned to the Clerks' offices numbered 298,217 as against 249,142 which continued to increase the work of the Clerks' offices. Chapter 425 of the Acts of 1949 amending G.L. Chap. 90. Sec. 20A which became effective January 1st will undoubtedly further increase the work in the Clerks' offices in this type of case. Cases reported to the Appellate Division increased from 82 to 90 but there was a decrease in such cases appealed to the Supreme Judicial Court from 20 to 15. The insane commitments were 5,938 as against 6,150 for the previous year. These commitments entail a great deal of work for the justices of many courts outside the District Courts in Suffolk County. The number of neglected children, which cases are heard in the juvenile session of the court, decreased from 932 to 795. For the first time in five years there has been an increase in the number of juvenile cases. This year there were 5,219 as against 4,701 for the previous year. The Youth Service Board, established under the Acts of 1948, Chapter 310, has been in operation since January 1st, 1949 and its members have diligently applied themselves to their many perplexing problems. We are sure that the increase in juvenile cases can in no way be attributed to the operation of the Youth Service Statute and no conclusions to that effect are warranted. However, we think that one conclusion is warranted; namely, that the passage of this remedial legislation has not resulted immediately in the decrease of juvenile delinquency as was so confidently predicted by many of its sponsors. Juvenile delinquency depends upon so many factors and conditions that it is not ordinarily possible to attribute its increase or decrease in one year to any given cause. Experience has shown, however, that both as to juvenile deliquency and adult crime, favorable results cannot be accomplished solely by legislative means.

STATISTICAL COMPILATION OF WORK OF TRIAL JUSTICES

October 1, 1948 to October 1, 1949

(These figures were printed on p. 48 of the 25th report of the Council)

DELAYED DECISIONS

G. L. Chapter 220, Section 14A requires a justice or special justice of a District Court other than the Municipal Court of the City of Boston, who has reserved his decision in a case heard by him, to render his decision within a period of four months from the date when the hearing was closed or within such further time as the Presiding Justice of the Appellate Division of the court in which the case was heard may grant upon a request made in writing by such justice or special justice within the four month period. The Second Requirement of the Administrative Committee directs the clerk of each court to notify the Presiding Justice of said Court on the forty-fifth day after the completion of a trial or hearing of every case where a decision has not been rendered and the Chairman of the Administrative Committee on the sixtieth day after such completion.

The few delayed decisions reported by the clerks have been shortly filed after being brought to our attention.

NAME OF COUNSEL IN APPEALED CRIMINAL CASES

In order that it may appear in permanent form in our circular letter we call attention of the clerks to our letter to them dated November 25th, 1949 in reference to the entry of the name of counsel for the defendant in criminal cases appealed to the Superior Court. This letter was written at the suggestion of the Chief Justice of the Superior Court who requested that on all criminal cases that are appealed to the Superior Court the name of counsel for the defendant or the fact that no counsel appeared for the defendant be entered upon the complaint in order to expedite the disposition of appealed criminal cases in the Superior Court. We again urge all the clerks to be careful to comply with this request.

FORMS UNDER G. L. CHAP. 218, Sec. 35A

This statute was originally inserted in the General Laws by Chap. 349 of the Acts of 1943 and was entitled "An Act to Provide that Certain Persons Against Whom Complaints are Made in District Courts may be Given an Opportunity to be Heard before the Issuance of Process Thereon". It was effective September 1, 1943. It has since been amended by Chap. 293 of the Acts of 1945. In our circular letter of September 1, 1943 we suggested a form for use in carrying out the provisions of the aforesaid Chap. 349. We now recommend the discontinuance of the use of these forms. The statute imposes no obligation upon the court to notify a prospective defendant that a complaint against him has been applied for but requires a hearing upon request of the person against whom the complaint for a misdemeanor is made if seasonably made in writing and he is not under arrest. Ordinarily a person against whom a complaint is sought is not aware of the application for such complaint unless some notification is received from the court. Accordingly, we feel that it is good practice in carrying out the purpose of the statute and in the interests of the administration of justice for some notification to be given by the clerk to the person against whom the complaint is sought in cases coming under the statute which the clerk feels are complicated or apt to be controversial. Of course if he has received notice from a party that he desires to be heard before a complaint is issued on behalf of a certain individual, he should arrange for a date for hearing and notify the parties. Long before the passage of this statute it was the custom in some courts to give a prospective defendant notice that a complaint against him had been applied for and to set a date for the hearing at which he could be present. We suggest the continuance of this practice on the part of the clerk of notifying a prospective defendant in appropriate cases by letter or by the following form or one of similar import:

COMMONWEALTH OF MASSACHUSETTS

....., SS., TO WIT:

(Name of the Court), holden in said district in the County of....., for the transaction of criminal business.

To

You are hereby notified that an application for a criminal complaint to issue against you for
has been made in this Court and a hearing thereon will be had on
the day of
in the year one thousand nine hundred and
at , at which time you may appear and present such evidence as you desire to have considered before said Court, or the Clerk thereof.

Clerk of the Court

Please bring this notice with you and present it at the Clerk's office.

SOME RECENT SUPREME COURT DECISIONS

In Commonwealth v. John L. Shea, 1949 A. S. 1045, the defendant was charged with operating a motor vehicle while under the influence of liquor and going away without stopping, making known his name, residence and the register number of his motor vehicle, after knowingly colliding with or otherwise causing injury to property. There was no direct and positive proof that the defendant was operating the motor vehicle. The evidence in this respect was altogether circumstantial and is stated in the opinion. The Court says:

> "The true rule of law respecting the probative character of circumstantial evidence is well settled. It is that the circumstances must be such as to produce a moral certainty of guilt, and to exclude any other reasonable hypothesis; "that the circumstances taken together should be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion, and producing, in effect, a reasonable and moral certainty, that the accused, and no one else, committeed the offence charged',"

and held that the evidence was insufficient to warrant the submission of the case to the jury.

In this connection it might be well to re-read the case of Commonwealth v. Wood, 261 Mass. 458, where the Court held the facts in that case justified a finding beyond a reasonable doubt that the defendant must have operated the automobile in violation of the statute.

Upon reading both cases the difference in the facts of each is easily recognized.

In Brown v. Bigelow, 1949 A. S. 1053, the plaintiff alleged that the defendant sold to one Dunkerly a quantity of hay knowing that the same was to be resold by Dunkerly in the open market as food for animal consumption; that the defendant negligently prepared such hay so that it was not reasonably fit for food but was dangerous to use as a food in that it contained foreign and deleterious

matter; that the plaintiff bought some of the hay from Dunkerly to be fed to his cows, and by reason of eating said hay plaintiff's cows became ill and died. The defendant demurred to the plaintiff's declaration, alleging that the plaintiff could not recover upon the count in contract for the reason that the declaration did not show a contractual relation between the defendant and the plaintiff, and that the plaintiff could not recover upon a count of tort for the reason that the plaintiff's declaration did not show or set forth facts that the alleged defective article was inherently dangerous, nor that it was intended to be used for human consumption. The Superior Court sustained the demurrer and the plaintiff appealed to the Supreme Court. The Supreme Court reversed the order sustaining the demurrer, holding that the case was governed by the decision in Carter v. Yardley & Company, Ltd., 319 Mass. 92, and that the failure to allege that the hay was inherently dangerous was not ground for demurrer; that all dangerous things are brought into the same class as those termed "inherently dangerous" to which the principle of liability to persons not in privity of contract has commonly been applied. The Court further said that it was not necessary to allege that the hay was intended for human consumption. The liability of the defendant for damage resulting from his negligence is not limited to personal injury.

In Andre v. Ellison, 1949 A. S. 985, there was an action of contract by the buyer against the seller for breach of contract for the sale of land. One of the defenses alleged was the statute of frauds. There was an alleged written contract which, standing alone, the plaintiff conceded was not sufficient to meet the requirements of the statute of frauds. The plaintiff contended, however, that the memorandum when considered with other writings was sufficient to satisfy the statute. The other wriitngs were an unsigned survey and an unsigned deed. The Supreme Court held on the facts in the case that the statute of frauds had not been complied with.

In Lasell v. Director of the Division of Employment Security et al, 1949 A. S. 1077, the petitioner was denied unemployment compensation by the Board of Review; upon her petition for review to the Municipal Court of the City of Boston under G. L. Chap. 151A, Sec. 42, amended by St. 1947, Chap. 434, that Court rendered a decision in her favor, and contrary to that of the Board of Review. The Director appealed to the Supreme Court and filed his draft report, which was disallowed by the trial judge. Thereupon the Director filed his petition to establish that report and the Appellate Division dismissed the petition and the director appealed to the Supreme Court. A careful reading this case gives important information as to what is required in such a petition and draft report.

In the case of Commonwealth v. Sostilio, 1949 A. S. 1211, the Court again defined "wanton or reckless conduct" to be "intentional conduct, by way either of commission or of omission where there is a duty to act, which conduct involves a high degree of likelihood that substantial harm will result to another"; that wanton or reckless conduct is the legal equivalent of intentional conduct, and that where, by said conduct, bodily injury is caused to another, the person guilty of such wanton and reckless conduct is guilty of assault and battery.

The Court further says that the insistence of the defendant (who was operating a motor vehicle in a midget automobile race) in attempting to drive past racers ahead of him, when there was not room enough to do so, which made a collision almost inevitable, can be found to be wanton and reckless conduct and support a conviction for manslaughter where death ensues as a result thereof.

In Commonwealth v. Capitol Theatre Company, 1949 A. S. 1215, the Court held that where a former owner of premises erected thereon a sign overhanging a way, without the permit required by a city ordinance, and a consequent owner of the premises continued to maintain such sign over said way, there was a continuing violation of the ordinance and its maintenance by the defendant was punishable under the provisions of the ordinance.

AN IMPORTANT CASE

In the case of John O'Leary, Pet. 1950 A. S. 21 the Court recently ordered a writ of habeas corpus to issue for the release of the plaintiff's minor son from the custody of the Superintendent of the Department for Defective Delinquents holding that the hearing upon which the son was committed to the department was invalid because no notice was given to this boy or anyone on his behalf of the filing of the application for his commitment before the hearing. The Court says that while such notice is not in terms prescribed in the statute it is not prescribed therein and that consequently it construes Section 113 as impliedly calling for notice in accordance with the elements inherent in due process.

The case should be carefully read and the decision closely followed in cases of commitments of defective delinquents under G. L. Chapter 123, Section 113.

THE NEW PARKING VIOLATION LAW

Chapter 425 of the Acts of 1949, effective January 1, 1950, amended G. L. Chapter 90, Section 20A by permitting the mailing to the clerk of the court with the notice the amount due as provided therein by postal note, money order or check. The Committee on November 25th last sent forms of notices to be used under the statute to all of the clerks. In our letter transmitting these forms we observed that the duties of the offender and the clerk in the case of the first offense were uncertain under the new law and suggested that the statute might be clarified by an amendment. It is too early yet to determine how the statute is working but we will be glad to have the clerks of the various courts notify us particularly as to their experience with first offenders.

PROBATION OFFICERS

Chapter 783 of the Acts of 1949 restored to the Administrative Committee the approval of the appointment of probation officers in the Boston Juvenile Court and the District Courts in Suffolk County excepting the Municipal Court of the City of Boston which authority for the past two years had been vested in the Municipal Court of the City of Boston. This seems to be an appropriate time to reprint some of the standards laid down by us and printed in our circular

letter dated September 1, 1943 and again in our letter of July 15, 1947. As w said in our letter of September 1, 1943, the standards are comparatively high and the judges should approach them as closely as possible in making their choices. Furthermore, the standards are flexible and cannot be too arbitrarily applied as there are many probation officers who only serve part time and they, of course, cannot be expected to have the qualifications particularly as to education and training of those who serve in full time positions.

The qualifications which generally should be fulfilled by the prospective appointee are as follows:

1. Be between 25 and 45 years of age;
2. Have had a high school education or its equivalent at least;
3. Have had some active experience in social work;
4. Should be in sound health, mentally mature and emotionally balanced and possessed of great patience;
5. Should have the qualities of leadership, be interested in his fellow men and able to work with others;
6. Should have religious affiliation and character not open to attack;
7. Should be respected by the police and cooperate with them and have the confidence of the people;
8. Should have all the necessary qualities to perform the duties which may be roughly classified as coming under the three following designations:
   - A. Investigation
   - B. Supervision
   - C. Rehabilitation

We feel that a probation officer should not be a deputy sheriff, police officer, clerk or court officer when it is possible to avoid such duplication of duties, should not be a relative of the judge making the appointment, a member of the Bar in active practice or a person who holds any public salaried office. This latter situation, of course, could not exist if the probation officer was one expected to give full time service to the court.

SIMULTANEOUS SESSIONS

The number of simultaneous sessions which may be held in each of the district courts for the calendar year 1950 has been determined by the Committee to be the same as that promulgated by Requirement No. 3 effective January 1, 1948 with the exception of the four courts which went on a full time basis February 1, 1949. The number of such sessions in these courts was reduced for the year 1949 and the justices thereof notified. The number of such sessions in these courts has been determined by the Committee to be the same as that authorized for the year 1949 with the exception of the Springfield District Court in which a second full time justice has been appointed. The simultaneous sessions in the Springfield District Court have again been reduced by reason of this appointment and the justices thereof notified. Following its usual custom, the Committee will entertain requests for additional simultaneous sessions from the justices of the various courts in unusual or meritorious situations.

VISITS TO THE COURTS

Carrying out its policy of frequent visits to the courts, the Committee has in the past calendar year visited practically all of the courts except the two courts in Barnstable County and those on Martha's Vineyard and Nantucket. We hope to be able to visit those courts early in the spring. Our experience with the various court officials continues to be pleasant and satisfactory and we again take the opportunity of thanking them for the courtesy and consideration they have shown the Committee during its visits. We trust that these opportunities of contact between the officials and the Committee have resulted in some benefit to the personnel of the various courts and the district court system in general.

Frank L. Riley, Chairman
Kenneth L. Nash
Leo H. Leary
Ernest E. Hobson
Arthur L. Eno

COMMONWEALTH OF MASSACHUSETTS
ADMINISTRATIVE COMMITTEE OF THE DISTRICT COURTS

September 8, 1950

TO THE JUSTICES, CLERKS AND PROBATION OFFICERS OF THE DISTRICT COURTS

The mid-year letter of the Committee has again been delayed by the extremely long session of the Legislature as the Committee has made it a practice to include in this letter the Acts of the Legislature passed at its last session that are of particular interest to the District Courts. Many of them have been in effect for some time and were effective even before they appeared in print. On our visits to the Courts we have called attention to several of these Acts but will list them below so that they may be brought to the attention of the court officials in one place. The list is not all inclusive. Only a brief description of the Act is given and it is recommended that they be read carefully when they appear in print.

(Here follows a list of 54 statutes without special comment.)

CHAPTER 145

This is an Act further regulating probation records. It amends Section 85 of *Chapter 276* and Section 4A of *Chapter 279* of the General Laws. These sections require the probation officer to inform the Court whether the defendant has previously been convicted of crime and in case the crime charged is punishable by imprisonment for more than one year that the probation officer present to the Court such information as the Board of Probation has in its possession relative to prior criminal prosecutions and the disposition of the same before such

person is admitted to bail in court or before the Court disposes of the case against the defendant by sentence, placing on file or probation and requires the Court to obtain from its probation officer for disposition of cases punishable by imprisonment for more than one year all available information relative to prior criminal prosecutions, if any, of the defendant and the disposition of each such prosecution. Each section is amended by inserting therein the following:

> "Such record of the probation officer presented to the Court shall not contain as part thereof any information of prior criminal prosecutions, if any, of the defendant wherein the defendant was found not guilty by the Court or jury in said prior criminal prosecution."

We do not know what prompted this legislation as it would seem that no Court would give any consideration that might be detrimental to a defendant of a not guilty finding in a prior prosecution. However, it has caused a great deal of discussion among the probation officers of the various courts and we have received many inquiries as to what records are comprehended by the statute and also whether it is necessary for the probation department of each court to alter their present records which may contain not guilty findings and whether or not they should neglect to record such findings in the future. It is the opinion of the Committee that as this amendment applies only to the record presented to the Court, it would not seem necessary for the probation department of each court to alter their present records containing not guilty findings or neglect to record such findings in the future. The probation office's records should show a true picture of the disposition of each case brought before the Court. The only directive in the statute is that such records shall not be presented to the Court. We find there is a difference in procedure in the various courts as to the manner in which probation records are brought to the attention of the court. Where the records are presented orally to the court by the probation officer, he should omit findings of not guilty by the Court or jury in reading the record, and if a written record is presented to the Court, such findings should be omitted from this written record. A discharge of course is a finding of not guilty by the court but a dismissal for want of prosecution or at the request of the plaintiff, a return of no bill, a nolle prosequi or a finding of no probable cause is not a finding of not guilty by the Court or jury although the practical effect may be the same.

While we are on the subject of presenting probation records to the Court, it may be appropriate to remind probation officers that they should not present a defendant's record to the Court and the judge should not ask for the same until the judge determines that the defendant is guilty, except when bail is to be fixed on a continuance before trial.

CHAPTER 210

This Act prescribes the use of uniform official blanks in certain district courts of the Commonwealth. It does not apply to district courts in the County of Suffolk and it does not affect the forms of records for use in probation offices in the district courts. It requires the Administrative Committee, except as thus limited, to prescribe official forms which shall be used on and after Jan. 1, 1951.

These forms are to be furnished by the counties and the clerk of each court is to notify the county commissioners of his county on or before December 1st of the probable needs of his office for the ensuing year including an estimate of the quantity of each then in his possession. We do not feel that the words "official forms" cover the form of writs to be used as the approval of the form of writs rests with the Supreme Judicial Court. The Committee desires the assistance of all the justices and clerks in the performance of its duty in prescribing these forms and we would welcome suggestions from them in reference thereto at an early date. We are presently collecting from several of the courts copies of all their official forms but as many of them may be outmoded, we desire suggestions of any changes therein from any of the court officials.

CHAPTER 260 AND CHAPTER 558

These Acts regulate the attachment of wages by trustee process. The first Act which was approved March 27, 1950 placed the duty of prescribing forms under the statute entirely upon the Administrative Committee of the District Courts. After many consultations, this was called to the attention of the Legislature and *Chapter 558*, which was approved as an emergency law on June 23rd last, provided that the form of notice required under the statute should be prescribed in the Superior Court by the Chief Justice thereof, in the Municipal Court of the City of Boston by the Chief Justice thereof and in other district courts by the Administrative Committee of the District Courts and that the manner of serving such notice should be designated in each case by the justice, special justice or associate justice authorizing the attachment. As the Committee could not know that *Chapter 558* would be enacted before *Chapter 260* became effective, we sent to the various courts on June 12th forms to be used under *Chapter 260* which were in substance the same as those recommended by the Municipal Court of the City of Boston and had been agreed upon after consultation between the Chief Justice of that court and your Committee. In our letter transmitting these notices we asked the various courts to give us information as to the operation of the statute having in mind that some changes might be necessary in procedure or the forms if the statute was amended. On the whole we have found that the procedure has worked very well under the new statute and we have received some suggestions in reference to the forms and procedure. However, in view of the provisions of *Chapter 210* requiring the Committee to prescribe all official forms, we feel it wise to await further suggestions and observe the operation of the statute before making final changes in the present forms. We invite further suggestions from the justices and clerks.

SOME RECENT SUPREME COURT DECISIONS

Following are some decisions of the Supreme Judicial Court made since our last circular letter. A careful reading of them is recommended.

Cummings v. Wajda, 1950 A.S. 91. In this case the Court held that summary process is purely statutory procedure and can be maintained only in the instances specifically provided for in the statute. Those instances are where

there has been a "forcible entry", where there has been "a peaceable entry" and "possession is unlawfully held by force," where a "lessee" or "a person holding under him" holds possession without right after determination of the lease, where a mortgage or a tax title has been foreclosed and (with certain qualifications) where title has been registered.

Leventhal v. Krinsky, 1950 A.S. 197. In this case the note in question provided for the payment of the principal sum at a designated trust company "together with all costs and all legal expense for the enforcement and collection hereof, such charges in no event to be less than a sum equal to twenty per cent of the aggregate of principal and interest unpaid on this note at the time this note is placed in the hands of an attorney for collection". The Court holds that a stipulation in a promissory note for the payment of "a reasonable attorney's fee" is binding upon the maker of the note, and holds also, as is done in a majority of other jurisdictions, that a provision fixing the attorney's fee as a certain per cent of the principal or of the principal and interest is good at least unless it clearly appears that it is so unconscionable and oppressive as to amount to a penalty or that it is a device to circumvent the usury statutes.

Shaw v. Boston American League Baseball Company, 1950 A.S. 285. In this case the plaintiff was struck and injured by a baseball while attending a game at the defendant's baseball park. The Court holds that a spectator familiar with the game assumes the reasonable risks and hazards inherent in the game and said there could be no recovery.

Galjaard v. Day, 1950 A.S. 351. In this case the defendant obtained on October 21, 1948 judgment against plaintiff for the possession of a tenement in an action of summary process but the issuance of execution was stayed from time to time until some time in March, 1949. Plaintiff remained in possession of the tenement. On December 25, 1948 he fell on ice on a common walk on the premises. The Court held that the plaintiff, while he was in possession of the premises, because of the stay of the issuance of the execution, was a tenant at sufferance, and that the recent statutes providing for stays of execution in cases of summary process do not extend the tenancy at will.

Silke v. Silke, 1950 A.S. 371. In this case there will be found an interesting and helpful statement by Ronan, J. relative to the presumption of legitimacy and a review of the decisions of the Court regarding the period of gestation.

Commonwealth v. Carpenter, 1950 A.S. 403. In this case it was charged that the defendant "did wilfully and unreasonably saunter and loiter in a certain public street . . . called Columbus Avenue for more than seven minutes after being then lawfully directed there . . . to move on" by a police officer. The complaint was based upon *Chap. 40*, Section 34 of the Revised Ordinances of Boston (1947). The Court held, by a majority decision, that this section of the ordinances was unconstitutional.

Kerr v. Palmieri, 1950 A.S. 443. In this case, after a hearing, the judge allowed plaintiff's motion to reopen the case. The reason stated in the motion was that at the time of the trial records of a hospital of the veterans administration were not admissible but subsequently had become so by virtue of statute

1948, *Chapter 74*. The motion asked that the case be reopened and such evidence and any other matters pertaining to personal injuries of the plaintiff be heard. The defendant did not question that as a general proposition the granting of a motion to permit additional evidence to be introduced after the trial has been closed rests in the discretion of the trial judge, but argued that the allowance of this particular motion was erroneous as a matter of law because the statute concerning the records of a hospital of the veterans administration cannot be given a retroactive effect. The Court said that this statute relates to the admissibility of evidence and is therefore procedural and operates to affect pending cases. There are several other interesting points in this case worth noting.

Maguire v. Haddad, 1950 A.S. 485. This is an interesting case dealing with rent, termination of tenancy, tenancy at will and notice.

Standing and Special Justices when called upon to make a judicial review of decisions of the Board of Review in the Division of Employment Security under G.L. *Chap. 151A*, Section 42, will find the following cases helpful:

Olechnicky v. Director of the Division of Employment Security et al, 1950 A.S. 561;

Corrado v. Director of the Division of Employment Security, 1950 A.S. 621.

DISCRETIONARY STAY OF JUDGMENT AND EXECUTION IN SUMMARY PROCESS CASES

It is now provided by *Chapter 2* of Acts of 1948, as amended, that so long as this Act continues in force a stay or successive stays of judgment AND execution may be granted under sections nine to thirteen, inclusive of *Chapter 239* of the General Laws for a period not exceeding twelve months or for periods not exceeding twelve months in the aggregate.

During some of our visitations we have been asked by judges whether or not in our opinion it was necessary to stay both judgment and execution, or whether judgment could be entered and the issuance of execution alone stayed.

It is our considered opinion that the issuance of the execution can be stayed without the judgment being stayed. If judgment is stayed, the aggrieved party is deprived of his right to appeal. We think it the better practice to enter judgment and stay the issuance of the execution if that seems warranted. In the case of *Galjaard v. Day*, 1950 A.S. 351, it is stated in the opinion that judgment for possession was obtained but the issuance of execution was stayed. This also appears to have been done in the case of *Dennett v. Nesson*, 244 Mass. 299. As in neither case was there any criticism of this procedure by the Supreme Court, we conclude that it has the Court's tacit approval. In view of the fact that we have received complaints from the bar relative thereto, judges should be careful to see that no stays of execution are allowed in cases based upon a fourteen days notice to quit for nonpayment of rent.

While the situation in landlord and tenant cases has eased considerably during the past few months, it is still very troublesome in some localities. While

we feel that the judges and special justices of the district courts have administered the summary process law remarkably well under trying conditions, we occasionally receive complaints that in certain courts a tendency is shown to favor the landlord and in others the tenant. We are passing this criticism along having in mind that all the officials of the court in these cases will conduct themselves so that no justified criticism can be made in this respect.

EXTENSION OF PROBATION

We have been asked whether it is necessary for a defendant to appear before the Court at the end of his probationary period. We feel that the probationer should be before the Court if the terms of his probation are to be altered or extended unless he has consented to the alteration or extension of the terms thereof and this consent is in some way a matter of written record. It would not seem to be sound practice for the Court to act in the absence of the probationer if such waiver has been given orally to the probation officer. It must be borne in mind that a defendant is not obliged to accept probation with or without a suspended sentence and if he accepts either, he does so on certain terms to which he consents and such terms should not be changed without his consent and probably giving him a right to appeal in a district court from any new disposition of his case. *Marks v. Wentworth* 199 Mass. 44. In some courts it is the practice to notify the probationer by letter that his case will be considered by the Court on a certain date and that it will be necessary for him to appear at that time unless he signs and returns the enclosed paper to the effect that he agrees to a continuance of the case for one year upon the same terms without appearance. Accompanying this is a written agreement to be signed and returned to the probation officer that the probationer agrees to the continuance of his case upon the same terms to a certain date without his appearance. Of course, if a probation officer recommends that the case be dismissed at the end of the probationary period and the Court is willing to take the recommendation, there would seem to be no necessity for the probationer being present.

TIMES OF HOLDING TRIALS AND OFFICE HOURS OF CLERKS

During the past year we have had some complaints as to the punctuality with which courts opened and the irregularity with which certain sessions thereof are held and during the past summer we have had some complaints about the offices of the clerks closing in the afternoon. The times for holding civil and criminal sessions in the district courts and the hours in which the clerks' offices should be open were approved by the former Administrative Committee under the provisions of *Chapters 230* and *347* of the Acts of 1939 which were effective September 1, 1939 (now Gen. Laws *Chap. 218*, Sec. 15) and have not been changed by the present Administrative Committee. On inquiry we found that the offices of several clerks were authorized by the former Administrative Committee to close certain hours during the summer months. We have taken the matter up with the justices and clerks of these courts and have been very gratified at their reaction to our suggestion that the clerk's office in their courts be kept open as usual during the summer months in conformity with the general practice in the clerks' offices in the district courts.

The present Committee feels that in the interests of uniformity and to more adequately serve the bar and public the offices in all the district courts should be open until 4 o'clock on all days of the year except Saturdays and holidays. The Legislature, by *Chapter 460* of the Acts of 1947 having this in mind, authorized the clerks to operate their offices on Saturday with reduced personnel upon the approval of the justice of the court and the Administrative Committee.

If the officials of any court feel that there should be an exception to this general rule, they may take the matter up with the Committee as provided in the statute.

As to the punctuality of opening courts and the regularity of holding sessions, we urge all justices and special justices that they comply as nearly as is possible to the hours which have been established under the foregoing statutes and by their own rules to the end that the public and the bar are properly served. Parties and witnesses are required by legal process to attend at a certain time and place in proceedings before our courts and we rightly expect them to heed the directions of such process. It is only fair, therefore, that the courts should be operated as nearly as possible upon schedules that they themselves have fixed. The district court is known as the people's court and we should strive to make the service therein as adequate and satisfactory as may be to the general public and the bar.

APPEARANCE OF DISTRICT ATTORNEYS

We have been informed that some question has arisen as to the right of a district attorney or his assistant to appear for the Commonwealth in criminal cases in the district courts. We feel that such appearances are perfectly proper, are ordinarily very helpful to the court and that the practice should be encouraged. In support of this view the following is quoted from *Commonwealth v. Buck* 285 Mass. 41 at pages 43 and 44:

> "Although the statute (G.L. (Ter. Ed.) c. *12*, Sec. 27) expressly requires the attendance of the district attorney in the courts of superior jurisdiction, his appearance in district courts within his district is discretionary. It is a common practice for district attorneys to appear in district courts in cases where persons are charged with the commission of serious crimes. It is plain that the district attorney had power to appear for the Commonwealth in the District Court, and where as here the grand jury had returned an indictment against the defendant for the same offence charged in the District Court he could enter a nolle prosequi of the complaint, the effect of which without trial would be like dismissing a complaint."

COMMITTEE VISITATIONS

We have continued our recent practice of attempting to visit every court in the Commonwealth in approximately one year. This keeps the Committee in touch with the constantly changing personnel in the courts and affords court officials a chance to take up with the Committee any and all of their problems. These visits have been highly instructive to the Committee and we trust that they have been helpful to the various court officials. We have been pleasantly and cordially received in all instances and we wish to take this opportunity of thanking all of the court officials with whom we have come in contact for their courtesy and the cooperation that has been shown by them.

FRANK L. RILEY, Chairman
KENNETH L. NASH
LEO H. LEARY
ERNEST E. HOBSON
ARTHUR L. ENO

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